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TEAMWORK FOR EMPLOYEES AND MANAGERS ACT OF 1997

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Mr. JEFFORDS, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

MINORITY AND ADDITIONAL VIEWS

[To accompany S. 295]

The Committee on Labor and Human Resources, to which was referred the bill (S. 295) to amend the National Labor Relations Act to allow labor management cooperative efforts that improve economic competitiveness in the United States to continue to thrive, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

CONTENTS

I. INTRODUCTION

In his State of the Union address in 1996, President Clinton told the country: "When companies and workers work as a team, they do better. And so does America." Unfortunately, our Federal labor

law actually prohibits many forms of worker-management teamwork.

The Teamwork for Employees and Management (TEAM) Act, S. 295, will promote greater employee involvement by removing the barriers created by Federal labor law. These barriers, largely found in section 8(a)(2) of the National Labor Relations Act (NLRA), were originally targeted at "company" unions but actually sweep much broader to ban many cooperative labor-management efforts.

This legislation, S. 295, signals a new era in employee relations. The bill recognizes, as President Clinton did in his national address, that the best workplaces for employees and the most productive workplaces for employers are ones where labor and management work together.

The Senate has focused several of its legislative efforts on decentralizing decision making. In the employment arena, employee involvement increases local decision making and provides employees with a voice in how to structure the workplace. In workplaces where employee involvement programs have been implemented, employees are empowered to play a role in reaching decisions on many aspects of their employment.

As this Nation enters the 21st century, the committee believes it important that U.S. workplace policies reflect a new era of labor-management relations—one that fosters cooperation, not confrontation. Employees want to work with their employers to make their workplaces both more productive and more enjoyable.

A recent study of employees' views in this area indicates that a majority of workers want a voice in their workplace. They also believe that their contribution would be effective only if management cooperates. When asked to choose between two types of organizations to represent them, workers chose, by a 3-to-1 margin, one that would have no power but would have management cooperation over one with power but without management cooperation.[1] Employee involvement gives workers the best of both worlds by offering both empowerment and cooperation.

The legality of employee involvement and labor-management cooperative efforts must be clarified. These human resource programs move domestic industry toward the high performance workplaces necessary to compete in the increasingly competitive global economy. The broad definition in the NLRA were written for a different era of employer-employee relations and no longer make sense in today's workplace.

The hierarchical model of the work force of the early 20th century, where each employee's and supervisor's job tasks were compartmentalized and performed in isolation, is not effective in the current globally competitive marketplace. Federal labor law must evolve to adjust to the modern reality of overlapping responsibilities and each employee having a sense of the whole production process. The TEAM Act accomplishes this evolution. For these reasons, the committee fully supports its enactment.

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[1] *Worker Representation and Participation Survey,* Richard B. Freeman and Joel Rogers, Conducted by Princeton Survey Research Associates, December 1994.

II. PURPOSE AND SUMMARY

The purpose of S. 295, the Teamwork for Employees and Managers (TEAM) Act of 1997, is to amend the National Labor Relations Act (NLRA) to protect legitimate employee involvement programs against governmental interference, to preserve existing protections against coercive employer practices, and to allow legitimate employee involvement programs, in which workers may discuss issues involving terms and conditions of employment, to continue to evolve and proliferate.

The TEAM Act would clarify the legality of employee involvement programs by adding a proviso to section 8(a)(2) of the NLRA clarifying that an employer may establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest—including, among others, issues of quality, productivity, efficiency, and safety and health.

The bill also specifies that such organizations may not have, claim, or seek authority to enter into or negotiate collective bargaining agreements or to amend existing collective bargaining agreements, nor may they claim or seek authority to act as the exclusive bargaining agent of employees. Senate bill 295 specifies that the proviso does not apply in a case in which a labor organization is the representative of such employees, and S. 295 further provides that the priviso does not affect other protections within the NLRA, thereby ensuring that employee involvement cannot be used as a means to avoid collective bargaining obligations. The amendment to section 8(a)(2) contained in the bill is designed to provide a safe harbor for cooperative labor-management efforts without weakening workers' ability to select independent union representation.

III. BACKGROUND AND NEED FOR LEGISLATION

In the wake of the Industrial Revolution, American business operated under the time-honored principle of the division of labor. This theory was based on the belief that "when a workman spends every day on the same detail, the finished article is produced more easily, quickly, and economically."[2] Indeed, for most of this century, the accepted American method of human resource management—named "Taylorism" after Frederick Taylor, a turn-of-the-century engineer and inventor—has been top-down decision making aimed at minimizing "brain work" at the shop-floor level. Employees simply did as they were told by their supervisors, who also operated within confined parameters set by their superiors.

Decades ago, when market forces were relatively static with the United States in the dominant position, Taylorism ensured the continuity and conformity necessary for American companies to maintain their economic supremacy. The past 20 years, however, have witnessed a dramatic transformation in the fundamental nature of labor-management relations. This transformation is due primarily

[2] Alexis De Tocqueville, *Democracy in America* 555 (George Lawrence trans., Harper & Row 1988) (1848) (quoted in Michael L. Stokes, Note, *Quality Circles or Company Unions? A look at Employee Involvement After Electromation and Dupont,* 55 Ohio St. L.J. 897, 901 (1994)).

to foreign competition, rapid technological change, and other factors which have provided strong incentives for altering workplace relationships.

By the late 1970s, managers began to view employees as a source of ideas for "developing and applying new technology" and "improving existing methods and approaches to remain competitive."[3] Rather than organizing workers to perform a single task, as had been the practice under division of labor, companies began instituting programs to involve employees more broadly in solving problems and making decisions which once were exclusively within the realm of management.[4]

These programs, implemented in both union and nonunion workplaces, included quality circles, quality of work-life projects, and total quality management programs. By involving workers to varying degrees in most aspects of production, these programs frequently resulted in substantial productivity gains, as well as increased employee satisfaction.

FORMS OF EMPLOYEE INVOLVEMENT

Employee involvement comes in many forms. It is not a set "program," and therefore, it defies easy definition. Rather, employees involvement is a means by which work is organized within a company and, as such, a way for employees and employers to relate to one another within an organization.

Because of this, there is no single dominant form of employee involvement. It usually includes some structured method for addressing workplace issues through discussions between employees and employer representatives. Indeed, two out of every three employee involvement structures do not even have a manual of procedure, thereby allowing the participants to design their structure to meet their changing needs.[1]

Although employee involvement programs come in infinite varieties, for discussion purposes they can be classified in general terms into several categories. Five of the most common forms of employee involvement include:

Joint labor-management committees

In union settings, joint labor-management committees provide union and management leaders with a forum for ongoing discussion and cooperation outside the collective bargaining context. In nonunion settings, the committees are composed of employees (elected or volunteered) in addition to management officials.[6] While some of these committees have a special focus, most are designed to address multiple issues at the department or plant level and

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[3] Neil DeKoker, *Labor-Management Relations for Survival, in* Industrial Rel. Res. Ass'n Proc. of the 1985 Spring Meeting 576, 576 (Barbara D. Dennis ed., 1985) (quoted in Stokes, *supra* note 2, at 902).

[4] Stokes, *supra* note 2, at 903.

[5] *See* Edward E. Lawler III, Gerald E. Ledford, & Susan A. Morhman, *Employee Involvement in America: A Study of Contemporary Practice* (American Productivity & Quality Center: Houston, TX), at 33 (1989).

[6] Edward E. Potter, *Quality at Risk: Are Employee Participation Programs in Jeopardy?* (Employment Policy Foundation: Washington, D.C.), at 19 (1991).

often serve as an umbrella under which small employee involvement efforts operate.[7]

Quality circles

Quality circles are small groups of employees that meet regularly on company time with the goal of improving quality and productivity within their own work areas. They typically are comprised of hourly employees and supervisors who receive special training in problem-solving techniques. Although quality circles usually lack authority to implement solutions without management approval, they provide workers with an invaluable opportunity to influence the manner in which their products are manufactured and designed.[8]

Quality of work-life programs

Quality of Work-Life (QWL) programs are also designed to improve productivity but focus primarily on improving worker satisfaction. Unlike quality circles, which focus directly on product improvement, QWL programs are premised on the belief that making workers' jobs more meaningful will lead to gains in productivity. Techniques employed by QWL programs are intended to bring about fundamental changes in the relations between workers and managers and can include changing the decision-making, communications, and training dimensions within an organization. Joint labor-management committees are frequently used to coordinate and monitor QWL programs.[9]

Self-directed work teams

Self-directed work teams are groups of employees who are given control of some well-defined segment of production. Such teams are often responsible for their own support services and personnel decisions in addition to determining task assignments and production methods.[10]

Gainsharing

Gainsharing is the generic term used for a variety of programs intended to address the problem of loss of sales and jobs caused by declining productivity. A common feature of these programs is the payment of bonuses to employees when productivity is increased. Gainsharing programs are often developed and administered by joint labor-management committees, which also serve as clearinghouses for employee suggestions for improving productivity.[11]

Again, the examples discussed above are intended to provide illustrations of the various ways in which employee involvement has been utilized in today's modern workplace. Many other forms are successfully utilized by both small and large employers.

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[7] Congress has established a grant program, currently funded at $1.5 million, to help selected labor-management committees carry out joint programs. This program is administered by the Federal Mediation and Conciliation Service.

[8] Potter, *supra,* note 6, at 21. Martin T. Moe, Note, *Participatory Workplace Decision making and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union,* 68 N.Y.U.L.Rev. 1127, 1158 (1993).

[9] Moe, *supra* note 8, at 1158–59.

[10] *Ibid.*

[11] Moe, *supra* note 8, at 1160.

More important to this discussion, however, is the fact that employee involvement, regardless of its form, seeks as its fundamental goal to unlock the productive capabilities of American workers. And, while it may be argued that some similarities exist between modern employee involvement and the employer-dominated company unions of the 1930s, today's programs differ dramatically in intention, form, and effect from the organizations the National Labor Relations Act sought to abolish. Indeed, today's employee involvement programs "seek to engender labor-management cooperation and improve worker productivity and morale by granting employees greater involvement in the issues that most affect their work lives." [12]

EMPLOYEE INVOLVEMENT ENJOYS BROAD SUPPORT

Employees, employers, academics, and policy makers increasingly are extolling the virtues of employee involvement programs, notwithstanding the contentions of opponents of the TEAM Act.

Robert Von Bruns, Melinda Weide, and Michael Scarano, team members at IBM's Essex Junction, Vermont facility, discussed the benefits of employee empowerment in their testimony before the Senate Committee on Labor and Human Resources. The three employees observed that, compared to other shifts running the same tools, their team's production figures were the highest about 85% of the time.[13] Explaining this success, the IBM employees noted:

> We are effective and productive because the teams are empowered to make informed educated business decisions.
>
> A key element to the success of our teams is the principle of "Shared leadership." Every team member has the opportunity and is encouraged to take a leadership role with various tasks. For example, team members take turns in reporting at status and update meetings, acting as meeting facilitator and taking on new projects.
>
> Our presence here today is an example of the team process at work. We were selected by our peers, fellow teammates, to bring the [team] story before this panel. Our present and continued success depends on teamwork.[14]

When asked what would happen if, because of the current state of the law, the IBM teams would have to be disbanded, Mr. Von Bruns responded.

> [I]t would be like going back to the Middle Ages in the work force. We no longer would have the input that we do now; those of us who are on the floor, closest to the work, understand most quickly and are able to respond quickest to any changes that are needed. Also, the ownership that is part and parcel of teams would be gone.[15]

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[12] *Ibid.*

[13] Hearing on S. 295, the Teamwork for Employees and Managers Act before the Senate Committee on Labor and Human Resources, 105th Cong., 1st Sess. at 15 (Feb. 12, 1997) (statement of Melinda Weide, Michael Scarano, and Robert Von Bruns, IBM Team Members).

[14] *Ibid.*

[15] *Id.* At 22.

Ms. Melinda Weide, Mr. Von Bruns' colleague at the Essex Junction, Vermont facility, expanded on the values of employee participation:

> When I was hired, I was given the opportunity to become a team member . . . and I accepted that possibility. I was a bit skeptical because I had been on other teams, but never in the business work force. And to see it interact on this level is just wonderful. You can accomplish so much more. You do not have to wait for the answer to come from someone higher up. When they are not involved, and they do not have all the information, it would take them time to get the information that you already have. So to be able to have that power and make those decisions, it makes a big difference in the kind of product that we are able to put out.[16]

Ms. Weide opined on the need for, and effect of, passage of the TEAM Act:

> The teams would like the freedom to make the choices themselves, to make the working environment a better place. And a lot of times, our hands are tied. I think if the TEAM Act would pass, the teams would be much better, and you would see more of them. You would see the productivity everywhere pick up because people would go to work, they would enjoy going to work, they would have that pride, because they know that they are able to make a difference in the product they are putting out and have a choice in what they are doing, instead of having someone else tell them.[17]

Managers have voiced similarly enthusiastic support for employee involvement. In fact, William D. Budinger, Chairman and C.E.O. of Rodel, Inc., attributed the very survival of his company to the institution of teamwork and collaborative decision making.[18]

> It was clear to us that if we were going to survive, we would have to learn how to be better than our foreign competitors. . . . Teamwork and collaborative decision making have allowed us to achieve something that is generally thought to be impossible for a small American company—we can successfully compete in foreign markets . . . Teamwork is, I believe, the reason that our company has been so successful competing overseas. It is American teamwork that has made even the quality-obsessed Japanese electronics companies choose our materials over their locally-made options.[19]

Similarly, J. Thomas Bouchard, IBM Senior Vice President, Human Resources, informed the committee that "[t]eamwork is so important to IBM's competitiveness that it is, in fact, one of the

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[16] *Id.* At 26.
[17] *Id.* At 31.
[18] Hearing on S. 295, the Teamwork for Employees and Managers Act before the Senate Committee on Labor and Human Resources, 105th Cong., 1st Sess. at 9 (Feb. 12, 1997) (statement of William D. Budinger, Chairman and C.E.O., Rodel, Inc., Newark, Delaware).
[19] *Ibid.*

three major ways that we measure our success—every single IBMer is involved in teaming, and rewarded on how they support teamwork and their teammates."[20] Given this glowing endorsement of teamwork, Mr. Bouchard understandably expressed grave concern that employee involvement programs were under siege.

> [A]s a direct result of recent National Labor Relations Board decisions on teams and employee involvement plans, we have reviewed a number of IBM ideas on teamwork and have had to impose restrictions on teams in order not to run afoul of the law—even though those teams made good business and common sense. The argument that the current state of labor law does not result in a chilling effect on teamwork in U.S. companies is wrong.[21]

Former National Labor Relations Board Member Charles I. Cohen iterated similar concerns, in his testimony before the Committee.

> I strongly endorse the Team Act as the "Bridge to the 21st Century" for America's companies and America's jobs. Without the flexibility the TEAM Act provides, many of America's companies—and with them many of America's best-paying jobs—will not prosper as we move into the next century. The TEAM Act should become law because it will support America's companies in the intensely competitive global economy in which we find ourselves and keep important jobs from being swept away by foreign competition.[22]

Mr. Cohen, relying on his experience as a practicing labor lawyer and former NLRB Member, went on to state that, ". . . current law does *not* provide for a wide variety of cooperative workplace efforts. It is my conclusion that, having tried to square meaningful employee participation committees with the current law, it simply cannot be done."[23]

In testimony before the committee, law Professor Samuel Estreicher discussed the approach of current NLRA sec. 8(a)(2), whose broad prohibitions against any employer support of employee groups he believes to be unique among major Western industrialized countries.[24]

> [F]or several decades, American companies were able to live with this broader prohibition. The reason for that was that the model of worker-management relations envisioned by 8(a)(2) also dovetailed with the way American managers organized their work force. In a world in which

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[20] Hearing on S. 295, the Teamwork for Employees and Managers Act before the Senate Committee on Labor and Human Resources, 105th Cong., 1st Sess. at 16 (Feb. 12, 1997) (statement of J. Thomas Bouchard, Senior Vice President, Human Resources, International Business Machines Corp.).

[21] *Ibid.*

[22] Hearing on S. 295, the Teamwork for Employees and Managers Act before the Senate Committee on Labor and Human Resources, 105th Cong., 1st Sess. at 59 (Feb. 12, 1997) (statement of Charles I. Cohen, Partner, Morgan, Lewis & Bockius).

[23] *Ibid.*

[24] Hearing on S. 295, the Teamwork for Employees and Managers Act before the Senate Committee on Labor and Human Resources, 105th Cong., 1st Sess. at 107 (Feb. 12, 1997) (testimony of Samuel Estreicher, Professor of Law, New York University).

> workers park their brains outside the factory gate, and brainwork, in the words of Frederick W. Taylor, "was the exclusive preserve of large armies of engineers and managers," 8(a)(2) makes some sense."[25]

Estreicher went on to stress that:

> Today, sec. 8(a)(2), as written, is problematic for American companies . . . The "mass production" factory of the 1930's and 1940's is a relic of the past. Global competitive product markets put increasing pressure on managers to reduce the layers of supervisors and engineers that the old hierarchical structures required and to delegate increasing responsibility to front-line workers. American companies, particularly in [the] manufacturing sector—require "smart" workers who take "ownership" in their jobs—who can operate computer controls and understand the entire process involved in making a product or delivering a service, who can on their own (with minimal supervision) monitor quality and tailor their work to the special requirements of customers and suppliers. . . . This ongoing transformation of the workplace requires a high level of commitment from front-line workers that is flatly inconsistent with the unilateral style of the Taylorist school of management. Workers cannot be treated as passive recipients of management dictates if they are at the same time expected to learn new tasks and skills, rotate among work assignments, interact with engineers, customers and suppliers, and essentially supervise themselves.[26]

With regard to employee involvement and its relationship to the modern workplace, Professor Estreicher stated:

> Employee involvement is a desirable goal whether or not it increases the demand for independent representation, as long [as] it does not prevent workers from effectively deciding on their own whether they want such representation. Because employee involvement programs can enhance opportunities for worker participation and improve firm performance, but without foreclosing other options, legal restrictions should be lifted.[27]

Removal of legal restrictions that hamper worker participation is particularly critical in light of testimony of Professor Michael LeRoy, who estimated that "30 percent of U.S. work teams are probably in violation of Section 8(a)(2)."[28] Thus, Professor LeRoy concluded that:

> I support the TEAM Act because its language continues to provide meaningful protection against company unions

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[25] *Id.* at 108.

[26] Hearing on S. 295, the Teamwork for Employees and Managers Act before the Senate Committee on Labor and Human Resources, 105th Cong., 1st Sess. at 105 (Feb. 12, 1997) (statement of Samuel Estreicher, Professor of Law, New York University).

[27] *Ibid.*

[28] Hearing on S. 295, the Teamwork for Employees and Managers Act before the Senate Committee on Labor and Human Resources, 105th Cong., 1st Sess. at 112 (Feb. 12, 1997) (statement of Professor Michael H. LeRoy, Institute of Labor and Industrial Relations, University of Illinois at Urbana-Champaign).

> while legitimating enlightened human resource practices that aim to improve communication between non-supervisory employees and managers; and because it reasonably adapts the NLRA to the rigors of a supply-side, global economy.[29]

Similar recognition of the important role played by employee involvement programs has also been voiced by any number of prominent public policy-makers. In its final report and recommendations, President Clinton's Commission on the Future Worker-Management Relations acknowledged that "[e]mployee involvement programs have diverse forms, ranging from teams that deal with specific problems for short periods to groups that meet for more extended periods."[30] Perhaps more importantly, the President's Commission concluded:

> On the basis of the evidence, the Commission believes that it is in the national interest to promote expansion of employee participation in a variety of forms provided it does not impede employee choice of whether or not to be represented by an independent labor organization. *At its best, employee involvement makes industry more productive and improves the working lives of employees.*[31]

Similarly, as Secretary of Labor, Robert B. Reich, noted the fundamental changes taking place in today's modern workplace:

> High-performance workplaces are gradually replacing the factories and offices where Americans used to work, where decisions were made at the top and most employees merely followed instruction. The old top-down workplace doesn't work any more.[32]

In response to these changes, the Department of Labor issued a publication to American businesses that underscored the benefits of employee involvement:

> Highly successful companies avoid program failure by assembling employees into teams that perform entire processes—like product assembly—rather than having a worker repeat one task over and over. In many cases, teams of workers have authority usually reserved for managers: They hire and fire; they pan work flows and design or adopt more efficient production methods; and they ensure high levels of safety and health.[33]

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[29] *Ibid.* Indeed, the compliance problems addressed by Professor LeRoy may be exacerbated by certain State laws that require an employer to establish safety and health committees. For example, a 1993 NLRB General Counsel Advice Memorandum determined that such a committee, established pursuant to a Tennessee statutory requirement, violated section 8(a)(2) of the NLRA. *See Goody's Family Clothing, Inc.,* Case No. 10–CA–26718, 1993 NLRB GCM LEXIS 104 (September 21, 1993).

[30] *Commission on the Future of Worker-Management Relations: Report and Recommendations,* Dep't. of Labor and Dep't. of Commerce, December 1994.

[31] *Id. (emphasis added).*

[32] Robert B. Reich, *The 'Pronoun Test' for Success,* the Washington Post, July 28, 1993, at A19.

[33] *See Road to High-Performance Workplaces: A Guide to Better Jobs and Better Business Results,* U.S. Department of Labor, September 1994.

EMPLOYEE INVOLVEMENT WORKS

During the past 20 years, employee involvement has emerged as the most dramatic development in human resources management. One reason is that worker involvement has become a key method of improving American competitiveness.

Evidence of the success—and corresponding proliferation—of employee involvement can be found in a 1994 survey of employers performed at the request of the Commission on the Future of Worker-Management Relations. The survey found that 75 percent of responding employers—large and small—had incorporated some means of employee involvement in their operations. Among larger employers—those with 5,000 or more employees—the percentage was even higher, at 96 percent.[34] It is estimated that as many as 30,000 employers currently employ some form of employee involvement or participation.

The success of employee involvement can also be found in the views of American workers. A survey conducted by the Princeton Survey Research Associates found overwhelming support for employee involvement programs among workers, with 79 percent of those who had participated in such programs reporting having "personally benefited" from the process. Indeed, 76 percent of all workers surveyed believed that their companies would be more competitive if more decisions about production and operations were made by employees rather than managers.[35]

Clearly, employee involvement is more than just another passing fad in human resources management. Over the last 20 years, it has evolved—along with the global economy—into a basic component of the modern workplace and a key to successful labor-management relations. As such, American industry must be allowed to use employee involvement in order to utilize more effectively its most valuable resource—the American worker.

ELECTROMATION AND OTHER CASES SIGNAL NEED FOR CLARIFICATION

On December 16, 1992, the National Labor Relations Board (NLRB or Board) issued a decision in *Electromation, Inc.,*[36] a case which many thought would clarify the legality[37] of employee involvement programs. *Electromation* involved several employee participation committees within a small, nonunion company. Unrelated to any organizing effort,[38] management created the employee

[34] *The Nature and Extent of Employee Involvement in the American Workplace,* survey conducted by Aerospace Industries Associates, Electronic Industries Association, Labor Policy Association, National Association of Manufacturers, and Organization Resources Counselors, Inc., August 10, 1994.

[35] *Worker Representation and Participation Survey,* Richard B. Freeman and Joel Rogers, Conducted by Princeton Survey Research Associates, December 1994.

[36] 309 N.L.R.B. No. 163 (1992).

[37] The two provisions of the NLRA most directly at issue in the debate over the legality of employee involvement programs are sections 2(5) and 8(a)(2). Section 2(5) defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

[38] Although the Teamsters Union began an organizing drive shortly after the formation of the action committees, the NLRB determined that the company did not establish them to interfere

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teams in response to employee objections over several proposed changes in attendance and wage policies. The so-called "action committees" addressed the following workplace issues: (1) absenteeism, (2) no-smoking policy, (3) communication network, (4) pay progression for premium positions, and (5) attendance bonus program. The Board found that the company played the primary role in establishing the size, responsibilities, and goals of the committees and in setting the final membership and initial dates for meetings.

In order to determine whether the company committed an unfair labor practice, the Board first found that the action committees were "labor organizations" under the NLRA. The term "labor organization" is quite broad and encompasses "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[39]

Courts have added to the breadth of what constitutes a "labor organization" by finding that the term "dealing with employers" was not limited to collective bargaining situations, but was a much broader concept.[40] The Board, in *Electromation,* found that "dealing" included bilateral communication between workers and supervisors within the employee involvement program. Working with this wide-ranging definition, the NLRB held that the action committees were "labor organizations" under the NLRA.

The Board then turned to the company's role in establishing and operating the action committees. Under section 8(a)(2) of the NLRA, it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

In this context, the NLRB found the company had dominated the committees by establishing the size, responsibilities, and goals of the committees, and by selecting the final makeup and initial meeting dates for the committees. Accordingly, the Board held that the company had committed an unfair labor practice under Federal labor law. The decision was later affirmed by the Seventh Circuit Court of Appeals.[41]

The need for clarification of the legality of employee involvement programs has since moved far beyond the specific facts of the *Electromation* decision. The breadth of the relevant provisions of the NLRA left employers and employees in a legal never-never land. Furthermore, since the *Electromation* decision, the NLRB has considered charges involving the employee involvement efforts of some of the leading companies in the country and has consistently questioned the legality of these efforts:[42]

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with the employees' right to choose a union. In fact, the company disbanded the committees once it learned of the organizing efforts to avoid charges that it was tainting the election process.

[39] Section 2(5) of the NLRA, 29 U.S.C. § 152(5) (emphasis added).

[40] *See National Labor Relations Board* v. *Cabot Carbon Co.,* 360 U.S. 203 (1959).

[41] *Electromation, Inc.* v. *National Labor Relations Board,* 35 F.3d 1148 (7th Cir. 1994).

[42] Much has been made by opponents of S. 295 of the relatively small number of charges filed with the Board alleging a violation of section 8(a)(2). First, the NLRB process is wholly complaint-driven, and employees have a diminished incentive to challenge workplace structures which effectively meet their interest in having greater involvement in workplace decision making. In addition, the *Electromation* decision has had a chilling effect on legitimate employee involvement programs and on employers' plans to continue or expand such programs.

Donnelly Corp.[43]—Named "One of the 100 Best Companies to Work for in America" and recognized by the U.S. Department of Labor (DOL) for its innovative work system, the NLRB nevertheless issued a complaint against Donnelly charging that its employee involvement program violated section 8(a)(2). The irony was that the genesis of the complaint was testimony that Donnelly presented to DOL's Commission on the Future of Worker-Management Relations (Dunlop Commission) on "Innovations in Worker-Management Relations." Dr. Charles J. Morris, former editor of *The Developing Labor Law,* heard the testimony, believed the Donnelly system was a violation of section 8(a)(2), and filed the initial charge.[44]

Polaroid Corp.[45]—Also cited as "One of the Best 100 Companies to Work for in America," the Polaroid Corp. has long had an institutional commitment to employee involvement and has been a model for other companies establishing cooperative efforts. Despite the company's attempt in the early 1900s to reconstitute its successful committees to comply with section 8(a)(2), the Board's general counsel issued a complaint challenging the new program even though it removed all decision-making authority from the employees. In June 1996, an administrative law judge ruled that the new program violated section 8(a)(2).

EFCO Corp.[46]—The EFCO Corp. first became involved in employee involvement programs in the late 1970's with the establishment of an employee stock ownership plan (ESOP). The company then moved to utilize total quality control techniques and an extensive employee committee system. Four of the committees—employer policy review, safety, employee suggestion, and employee benefits—were challenged as violating section 8(a)(2) by the Carpenters' Union after an unsuccessful organizing effort.[47] Although acknowledging EFCO's commitment to employee empowerment, the administrative law judge nevertheless found that the committees were "labor organizations" and that the company had illegally dominated them by forming the committees, choosing initial members, participating in meetings, and selecting topics for discussion.

Keeler Brass Automotive Group.[48]—A unanimous NLRB ordered Keeler Brass Automotive Group to disband a grievance committee established for several of its plants. The Board, reversing a decision of an administrative law judge, found that Keeler Brass unlawfully dominated the formation of the committee and interfered with its administration. In a concurring opinion, Chairman Gould con-

[43] GR–7–CA–36843.

[44] Although this charge was eventually dismissed, a Donnelly employee then amended an unrelated unfair labor practice charge she had filed to include the alleged section 8(a)(2) violation. A complaint was issued on this second charge and a hearing was scheduled, but the charge was ultimately settled on other grounds.

[45] 1–CA–29966.

[46] 17–CA–16911 (March 7, 1995).

[47] The Carpenters' Union attempted to organize EFCO employees in the summer of 1993. However, the union never filed a petition for an election with the NLRB.

[48] 317 NLRB No. 161 (June 14, 1995).

> cluded that the committee was not capable of independent action, despite the fact that the committee was not created in response to union organizing efforts or as a means to undercut independent action by employees, participation on the committee was voluntary and determined by election, and employees were the only voting members of the committee.

The Board's broad interpretation of the term "labor organization," which includes many employee participation programs, and the strict limits on the role employers may play in such organizations make it very difficult for employee involvement programs to proceed successfully. Clearly, a legislative change must be made.

CURRENT NLRA PROHIBITIONS ARE TOO BROAD

A brief look at the history of section 8(a)(2) demonstrates why the provision was originally crafted so broadly and why such breadth interferes with the preferred method of labor-management organization in many U.S. firms today. In 1935, when Congress passed the NLRA, the so-called Wagner Act,[49] employer-dominated (company) unions had become a focal point in the national debate over how to improve labor-management relations. The precursor to the NLRA, the National Industrial Recovery Act, passed in 1933, had temporarily given employees "the right to organize and bargain collectively through representatives of their own choosing."[50] However, the Recovery Act proved to be of little value in ensuring those rights, in part because it left the subject of employer-dominated unions largely unaddressed.

Under the Recovery Act, employers could use company unions as tools to avoid recognition of, and collective bargaining with, independently organized unions. Employers often refused to recognize independently formed unions on the grounds that employees were already represented, albeit by a company union. As a result, employers could establish and bargain exclusively with unions that were formed and operated largely at their direction.

The Recovery Act permitted such abuses of company unions for various reasons. Primarily, the act contained inadequate enforcement mechanisms.[51] Further, it did not specifically prohibit company unions, although the law prohibited employers from requiring employees to join a company union as a condition of employment.[52] Last, the act granted employees the right to organize but did not specify "the kind of organization, if any, with which employees should affiliate."[53] Thus, consistent with the Recovery Act, and employer could appear to be "recognizing and cooperating with organized labor" while avoiding the dangers inherent in dealing with a union not subservient to the employer's interests.[54]

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[49] Senator Robert Wagner was the prime sponsor of the bill which became the National Labor Relations Act (NLRA).

[50] National Industrial Recovery Act, 48 Stat. 195, 198 (1933) (the rights established by the Recovery Act had only temporary effect, because section 2 of the act contained a sunset provision).

[51] Hardin, Patrick, *The Developing Labor Law* (3d ed. 1992), vol. 1 at 25–26.

[52] National Industrial Recovery Act, 48 Stat 195, 198–99 (1933).

[53] I. Bernstein, *Turbulent Years,* at 38 (1970).

[54] Hardin, *supra* note 51, at 26.

Recognizing the inadequacies of the Recovery Act, section 8(a)(2) of the NLRA was specifically drafted to prevent employers from using company unions to avoid recognizing and collective bargaining with independently organized unions. Senator Robert Wagner, sponsor of the bill which became the NLRA, stated that "[t]he greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since enactment of the recovery law."[55]

According to an article printed in the New York Times during debate over the NLRA, the number of employees in company unions and increased from 432,000 in 1932, before passage of the Recovery Act, to 1,164,000 just 1 year later.[56] Over 69 percent of the company unions in existence at that time had been formed in the brief period following passage of the Recovery Act.[57] The magnitude of this problem following passage of the Recovery Act was evidenced by the fact that more than 70 percent of the disputes coming before the National Labor Board (precursor to the NLRB) before enactment of the NLRA concerned employers' refusal to deal with properly elected union representatives.[58]

Prior to passage of the NLRA, therefore, some employers used company unions as a tool to avoid collective bargaining with independently organized unions and to control the collective bargaining that did take place. Section 8(a)(2) of the NLRA was an important measure for ensuring that employers did not use company unions as an obstacle to genuine collective bargaining.

However, the legislative history of the NLRA suggests that, while Congress strongly desired to eliminate barriers to genuine collective bargaining, it did not desire to ban all employer-employee organizations. Senator Wagner, in a discussion regarding the advantages and disadvantages of company unions stated that:

> [t]he company union has improved personal relations, group-welfare activities, and other matters which may be handled on a local basis. But it has failed dismally to standardize or improve wage levels, for the wage question is one whose sweep embraces whole industries, or States, or even the Nation.[59]

Senator Wagner further stated, regarding a bill containing provisions virtually identical to section 8(a)(2) of the NLRA, that it:

> [did] not prevent employers from setting up societies or organizations to deal with problems of group welfare, health, charity, recreation, insurance or benefits. All of these functions can and should be fulfilled by employer-employee organizations. But employers should not dominate organizations which exist for the purposes of collec-

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[55] 78 Cong. Rec. 3443 (1934) *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act,* 1935, at 15 (1949).

[56] Wagner, Robert. *Company Unions: A Vast Industrial Issue,* the New York Times, Mar. 11, 1934.

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*

> tive bargaining in regard to wages, hours, and other conditions of employment.[60]

Thus, at the outset of debate over the NLRA, Congress indicated its disapproval of employer-dominated organizations which existed for purposes of collective bargaining but did not signal its disapproval of all employer-employee organizations.

Further debate over the proposed scope of section 8(a)(2) confirmed that Congress did not desire to ban all employer-employee organizations. Senator Wagner stated several times that "[e]mployer-controlled organizations should be allowed to serve their proper function of supplementing trade unionism. . . ."[61]

The Senate report on S. 2926, an earlier version of the NLRA containing provisions virtually identical to 8(a)(2), confirms this view. Regarding employers' use of company unions as an obstacle to collective bargaining, the report on the bill stated:

> [t]hese abuses do not seem to the committee so general that the Government should forbid employers to indulge in the normal relations and innocent communications which are part of all friendly relations between employer and employee. . . . The object of [prohibiting employer-dominated unions] is to remove from the industrial scene unfair pressure, not fair discussion.[62]

Senator Walsh, then Chairman of the Senate Committee on Education and Labor, concurred in this view. Commenting on S. 2926, he stated that "this . . . unfair labor practice seeks to remove from the industrial scene unfair pressure by the employer upon any labor organization that his workers may choose, yet leaves fair discussion unhampered."[63]

Thus, the NLRA's legislative history strongly suggests that Congress desired to prevent employers from using company unions as an obstacle to collective bargaining. At the same time, however, the act's sponsors sought to leave intact organizations intended to promote employer-employee communication and cooperation.

The broad language of section 8(a)(2) does not seem consistent with a congressional intent to prohibit only employer-employee organizations which would inhibit recognition of, and collective bargaining with, independent unions. However, the Congress's experience with narrow interpretations by the courts of labor relations legislation prior to enactment of the NLRA may explain why the NLRA's sponsors drafted section 8(a)(2) so broadly.

Specifically, in the decades preceding enactment of the NLRA, Congress had passed various measures to allow the development of organized labor and to ensure the right to bargain collectively. These measures included the Erdman Act, enacted in 1898; sections of the Clayton Act; the Railway Labor Act; and the Norris-

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[60] *Hearings on S. 2926* before the Senate Committee on Education and Labor, 73rd Cong., 2d Sess. 9 (1934) (statement of Senator Wagner) *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act,* 1935, at 39–40 (1949) (emphasis added).

[61] 78 Cong. Rec. 3443 (1934) *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act,* 1935, at 16 (1949); Wagner, Robert. *Company Unions: A Vast Industrial Issue,* the New York Times, Mar. 11, 1934.

[62] S. Rep. No. 1184, 73rd Cong., 2d Sess. (1934) *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act,* 1935, at 1104 (1949).

[63] 78 Cong. Rec. 10,559 (1934) *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act,* 1935, at 1125 (1949).

LaGuardia Act.[64] Of these, the Clayton Act and the Norris-LaGuardia Act were broadest in their scope of coverage.[65]

Congress designed sections 6 and 20 of the Clayton Act to prevent courts and employers from using the Sherman Act as a barrier to union activity and development. Under the Sherman Act, Federal courts were able to assert Federal question jurisdiction over labor disputes and frequently held that organized labor activities, by obstructing the flow of goods in interstate commerce, violated the act.[66] Section 6 of the Clayton Act prevented the application of the Sherman Act to organized labor "by providing that labor itself is not 'an article of commerce.'"[67] The section also specified that labor organizations did not violate antitrust laws by "lawfully carrying out" their "legitimate objectives."[68]

Section 20 of the Clayton Act was designed to greatly restrict the ability of courts to issue injunctions against organized labor activity. The first paragraph of section 20 was intended to reduce the use of injunctions by requiring that there be no adequate remedy at law and actual or threatened injury before issuance of an injunction.[69] The second paragraph of section 20 listed several labor activities and provided that "none of [those] activities shall 'be considered or held to be violations of any law of the United States,'" and prohibited enjoining those activities even if the requirements of the first paragraph were met.[70]

Thus, Congress attempted to permit organized labor to develop through language in the Clayton Act which specifically prohibited various types of interference with organized labor. Some of these attempts were thwarted, however.

Despite the seemingly broad scope of sections 6 and 20 of the Clayton Act, the Supreme Court interpreted both sections very narrowly in *Duplex Printing Press Co.* v. *Deering.* The Court interpreted the first paragraph of section 20 as approving of existing labor-injunction practice rather than as imposing more stringent requirements for the issuance of injunctions against organized labor.[71] Further, the Court interpreted the phrase "between an employer and employees" contained in the first paragraph as limiting application of both paragraphs to cases between an employer and its own employees.[72] The Court interpreted the Clayton Act as having minimal impact on barriers to union development and activity, despite statutory language which would suggest otherwise.

Given the Court's narrow interpretation of the Clayton Act, and the failure of the Recovery Act to ensure the right to organize and bargain collectively, it was not surprising that Congress drafted

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[64] Hardin, *supra* note 51, at 12–24 (providing a historical background to the National Labor Relations Act).

[65] The Erdman Act and the Railway Labor Act were limited in scope to employees engaged in the operation of interstate trains. Hardin, *supra* note 51, at 14, 20.

[66] Hardin, *supra* note 51, at 9–10, 16.

[67] Hardin, *id.* at 16.

[68] *Ibid.*

[69] Although both of these requirements were historically present in equity, courts had largely disregarded them in labor-injunction practice prior to passage of the Clayton Act. Hardin, *supra* note 51, at 16–17.

[70] Hardin, *supra* note 51, at 17.

[71] *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443 (1921) (construed in Hardin, *supra* note 51, at 18).

[72] *Ibid.*

section 8(a)(2) of the NLRA broadly.[73] Prior to the period in which the NLRA was enacted, courts often resisted efforts designed to permit the growth of organized labor and collective bargaining.[74] Thus, to ensure employees the rights to organize and bargain collectively, Congress expansively crafted the prohibition in section 8(a)(2) of the NLRA.

As the previous discussion on employee involvement indicates, a broad-sweeping prohibition of all employer-employee organizations no longer serves the interests of giving workers an effective voice in their workplace. Although the right to independent representation remains a fundamental principle of Federal labor law, nothing about modern employee involvement interferes with that right.

Like all aspects of society, today's workplace is very different than it was 60 years ago. In 1935, organized labor was in its formational stages and was at the mercy of employers intent on derailing its development. The myriad labor protections on the books today—the Fair Labor Standards Act, the Occupational Safety and Health Act, the Worker Adjustment and Retraining Notification (WARN) Act and the Family and Medical Leave Act—are testimony to the tremendous influence and power of independent labor unions to protect working men and women.

Likewise, working men and women have changed and so, consequently, have their needs in the workplace. The demands on, and skills required of, workers in today's information-based economy are very different than those prevalent in the manufacturing-driven economy of the early 20th century. The work force of today mirrors the demographic changes of the United States as a whole, and thus, the interests and values of workers are increasingly more diverse.

The nature of work, for both employees and managers, has also evolved tremendously in 60 years from the perspective of both technological and organizational developments. Workplace structures that have the flexibility to meet the situational and differing needs of employees, while also addressing the productivity demands of employers, are at a premium in the modern working environment. While formal representation through an independent labor organization will remain the preferred form of organization in many workplaces, clearly, there must be a place in this Nation's labor laws for cooperative arrangements between employees and employers to address the challenges and demands of working in a globally competitive marketplace.

IV. Legislative History and Committee Action

On February 10, 1997, Senator Jeffords introduced the Teamwork for Employees and Managers (TEAM) Act of 1997, S. 295. The bill is co-sponsored by Senators Coats, Gregg, Frist, DeWine, Enzi, Hutchinson, Collins, Warner, McConnell, Ashcroft, Gorton, Grassley, Nickles, Mack, Shelby, Allard, McCain, and Hollings.

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[73] The definitional provisions in section 13 of the Norris-LaGuardia Act were also drafted broadly, again demonstrating Congress's tendency toward drafting pro-labor acts broadly in this period. Hardin, *supra* note 51, at 23–24.

[74] Hardin, *supra* note 51, at ch. 1.

On Febrary 12, 1997, the Senate Committee on Labor and Human Resources held a hearing (S. Hrg. 105–7) on the TEAM Act. The following individuals provided testimony:

William Budinger, Chairman and CEO of Rodel, Inc., Newark, DE.

J. Thomas Bouchard, Senior Vice President, IBM, Armonk, NY.

Medlinda Weide, Michael Scarano, and Robert Von Bruns of IBM, Essex Junction, VT.

Charles I. Cohen, of Morgan, Lewis & Bockius, Washington, DC.

Robert Sebris, Jr., of Sebris Busto, Bellevue, WA.

Jonathan P. Hiatt, general counsel to the AFL–CIO, Washington, DC.

Robert Muehlenkamp, Assistant to the General President, IBT, Washington, DC.

Samuel Estreicher, Professor of Law, New York University, New York, NY.

Michael H. LeRoy, Institute of Labor and Industrial Relations, University of Illinois, Urbana-Champaign, IL.

Thomas C. Kohler, Boston College Law School, Newton, MA.

Additional statements and letters regarding S. 295 were received and placed in the record.

On February 26, 1997, the Senate Committee on Labor and Human Resources met in executive session to consider S. 295. A quorum being present, the committee voted on the following amendment:

Senator Kennedy offered an amendment to expand mandatory subjects of bargaining. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

On February 28, 1997, the Senate Committee on Labor and Human Resources again met in executive session to consider S. 295. A quorum being present, the committee voted on the following amendments:

Senator Kennedy offered an amendment to provide that the TEAM Act would not apply where this is organizational activity among employees. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi

Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Kennedy offered an amendment to require NLRB secret ballot election of team members. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Kennedy offered an amendment to permit treble damages for unfair labor practices. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Kennedy offered an amendment that would require a priority investigation, by the NLRB, of employee discharges that occur during a union organizing campaign. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

On March 5, 1997, the Senate Committee on Labor and Human Resources again met in executive session to consider S. 295. A quorum being present, the committee voted on the following amendments:

Senator Wellstone offered an amendment to increase remedies in the event of a violation of section 8(a)(2) of the NLRA. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell
	Bingman

Senator Kennedy offered an amendment to change the NLRA definition of "supervisor." The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

The committee then voted to report S. 295 favorably.

YEAS	NAYS
Jeffords	Kennedy
Coats	Dodd
Gregg	Harkin
Frist	Mikulski
DeWine	Bingaman
Enzi	Wellstone
Hutchinson	Murray
Collins	Reed
Warner	
McConnell	

V. Explanation of Bill and Committee Views

The TEAM Act clarifies that it shall not constitute or be evidence of a violation of section 8(a)(2) of the NLRA for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health. This language creates a safe harbor in Federal labor law for a wide range of employee involvement initiative. Supervisors and

workers can discuss a myriad of issues that affect both the productive capacity of a company and the quality of work-life.

Some of the matters of mutual interest which employee involvement structures address will unavoidably include discussions of conditions of work. The processes by which a company "produces" its product are inextricably linked to the terms and conditions of individual's employment in those processes. Lawrence Gold, counsel to the AFL-CIO, perhaps described this reality best when he argued before the NLRB:

> What is productivity? It's who does what, it's whether "A" works certain hours, whether "B" gets relief, whether a particular way of moving materials is sound or unsound. People are affected by that, their jobs and prerogatives, their seniority, their vacations. All of that is the stuff of working life. And to say that you can abstract productivity from working conditions is something that I have a great deal of difficulty with.[75]

Indeed, if employee involvement programs were prohibited from discussing issues related to conditions of work, their effectiveness would be severely hampered. The phrase "terms and conditions of employment" includes issues such as grievance procedures, layoffs and recalls, discharge, workloads, vacations, holidays, sick leave, work rules, use of bulletin boards, change of payment from a weekly salary to an hourly rate, and employee physical examinations.[76] Even if it were possible to limit employee involvement to issues unrelated to working conditions, doing so would limit their ability to be a forum for employees and managers to develop comprehensive strategies that contribute both to the economic well-being of the company and to the pecuniary and nonpecuniary satisfaction of the work force.

Despite the breadth of the language creating the safe harbor, the TEAM Act retains several important protections in section 8(a)(2). First, the bill expressly provides that the TEAM Act is not applicable "in a case in which a labor organization is the representative of such employees as provided in [NLRA] section 9(a)." This language ensures that the TEAM Act only applies in nonunion settings, and clarifies an important goal of the bill, *viz.,* to provide nonunion workers with the same right to form teams that union workers have. Equally important, the bill provides that employee involvement initiatives may not have, claim, or seek authority to be the exclusive bargaining representative of employees or to negotiate, enter into, or amend collective bargaining agreements. This is a very significant protection that distinguishes employee involvement programs from the company unions of yesteryear that section 8(a)(2) was designed to prohibit. Even after enactment of S. 295, such company unions would continue to be unlawful under section 8(a)(2).

For example, in *National Labor Relations Board* v. *Lane Cotton Mills,*[77] a violation of section 8(a)(2) was found where the employer

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[75] Transcript of Proceedings Before the National Labor Relations Board of *Electromation, Inc.* (Case No. 25–CA–19818) 61–62 (Sept. 5, 1991).

[76] *See* Hardin, *supra* note 51, at 885–86.

[77] 111 F.2d 814 (5th Cir. 1940).

established an in-house welfare association and refused to bargain with a Textile Workers Organizing Committee that had been elected by the employees. The employer's action in this case would not fall within the safe harbor created by the TEAM Act, both because management treated the welfare association as the exclusive bargaining representative, conduct specifically prohibited by S. 295,[78] and because the TEAM Act would not apply in a union setting. Similarly, in *Solmica*,[79] a company president suggested to his employees that they could resolve their differences themselves, without a union. The employees agreed and eventually signed a collective bargaining agreement with the president. Again, this conduct would continue to be a violation of section 8(a)(2), as the TEAM Act would not permit employee involvement structures, no matter how formal or informal, to negotiate collective bargaining agreements.

While opponents of the TEAM Act have argued that many of the 1930's "company unions" which prompted the enactment of section 8(a)(2) shared the beneficent characteristics of today's employee involvement structures, a 1937 Bureau of Labor Statistics study, entitled *Characteristics of Company Unions, 1935* [hereinafter *BLS Survey*] paints a substantially different picture. The study of 126 company unions found that 64 percent of them had been formed in response to a strike or local union activity. The remainder had either been intended to improve plant morale (11.2 percent) or to appease public opinion or respond to governmental encouragement of collective bargaining (24.8 percent).[80]

Even if some of the characteristics of company unions were shared by today's employee involvement structures, there is a critical distinction. Unlike company unions, legitimate employee involvement programs do not pretend to serve the same purpose as an independent labor union, which acts as the exclusive representative of the employees for collective bargaining and handling of grievances.

Unlike the employee involvement structures of today, company unions in the first half of this century were being advanced as exclusive alternative to labor unions. And companies were refusing to bargain with duly chosen, independent labor unions in favor of company unions. However, as discussed previously, these company unions rarely possessed the essential characteristics of a genuine collective bargaining representative.

Under S. 295, the decision to choose formal organization and to secure independent representation remains in the hands of the employees. Nothing in the TEAM Act interferes with that choice. The safe harbor created in S. 295, while arguably broad in terms of the types of employee involvement structures to which it applies, is quite narrow in terms of the scope of conduct related to such structures which is legitimized. The bill states that "it shall not constitute or be evidence of an unfair labor practice under *this paragraph* for an employer" to establish and participate in an employee involvement program. (emphasis added). Senate bill 295 also specifically provides in section 4 that "nothing in this Act shall affect

[78] See also, *National Labor Relations Board* v. *Link-Belt Co.,* 61 S. Ct. 358 (1941), *American Tara Corp.,* 242 NLRB 1230 (1979).
[79] 199 NLRB 224 (1972).
[80] BLS *Survey* at 84.

employee rights and responsibilities contained in provisions other than section 8(a)(2) of the National Labor Relations Act, as amended."

Thus, the other protections in section 8(a) of the NLRA which prohibit employer conduct that interferes with the right of employees to choose independent representation freely remain in full force. If employee involvement programs do not prove to be an effective means for employees to have input into the production and management policies that affect them, those employees retain the right at all times to organize formally and seek union representation. Section 8(a)(1)—which makes it an unfair labor practice for employers to interfere with, restrain, or coerce employees in the exercise of their rights, guaranteed by section 7 of the NLRA, to organize and bargain collectively through representatives of their own choosing—remains untouched by the TEAM Act.[81] Employee involvement programs cannot be used to interfere with employees' ability to exercise freely section 7 rights.[82]

In sum, S. 295 creates a safe harbor in the NLRA for a broad range of employee involvement programs. These legitimate initiatives come in an infinite variety of organizational forms and deal with a broad spectrum of workplace issues.

However, this safe harbor exists only for the purposes of section 8(a)(2) and protects the workers' right to choose independent representation at any time.

The committee places a high priority on the enactment of S. 295. The workplace of today is simply not the same as the workplace that was prevalent in the America of the 1930's when the National Labor Relations Act became law. This Nation must prosper in an increasingly competitive and information-driven economy where, at every level of a company, employees must have an understanding of, and a role in, the entire business operation.

Employee involvement in the modern workplace has proven to be an effective strategy at increasing both the value that each employee brings to the production process and the job satisfaction that each employee derives from the workplace. The *Electromation* case, and its progeny, have had a chilling effect on the existence of employee involvement programs. For these reasons, the committee recommends that the Senate promptly pass S. 295.

This Nation's labor law must be relevant to the employer-employee relationships of the 21st century. The committee believes strongly that the TEAM Act is crucial to our Nation's competitiveness as well as our workers' sense of job satisfaction.

Significantly, the committee believes that the bill poses no threat to the well-protected right of employees to select representatives of their own choosing to act as their exclusive bargaining agent. Even with the changes to the NLRA proposed in S. 295, an employee involvement program may not engage in collective bargaining nor may it act as the exclusive employee representative. In fact, the

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[81] Similarly, the TEAM Act does not alter the prohibition in section 8(a)(3) making it an unfair labor practice for an employer to discriminate against any employee on the basis for his or her membership in a labor organization.

[82] In *Stone Forest Industries, Inc., 36–CA–6938* (March 17, 1995), it was held that an employer's promise, the day before a union election, to establish a communications committee to deal with employee grievances was a violation of section 8(a)(1) because it was used as an inducement to persuade employees to vote against the union.

TEAM Act applies in nonunion settings only. The prohibitions in the NLRA outlawing interference with employees' attempts to form a union and preventing employers from avoiding bargaining obligations by directly dealing with employees remain unaffected by the TEAM Act.

In sum, the TEAM Act permits supervisors and managers to confront and solve the myriad problems and issues that arise in a workplace. Without this important legislation, the committee believes the Nation would be idling a vast human resource that can yield untold dividends for the country.

VI. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., March 14, 1997.

Hon. JAMES M. JEFFORDS,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 295, the Teamwork for Employees and Managers Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Sadoti.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

S. 295—TEAMWORK FOR EMPLOYEES AND MANAGERS ACT OF 1997

CBO estimates that enacting this bill would have no significant effect on the federal budget. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. S. 295 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would impose no costs on state, local, or tribal governments.

S. 295 would amend the National Labor Relations Act to allow employers to work with employees in "Employee Involvement" programs for the purpose of addressing matters of mutual interest (such as issues of quality, productivity, efficiency, and safety and health), so long as these organizations do not seek to negotiate collective bargaining agreements with the employers. The bill could affect the workload and costs of the National Labor Relations Board by increasing or decreasing the number of investigations of employers' involvement in the activities of employee groups. We anticipate that such effects, if any, would not be significant.

The CBO staff contact for this estimate is Christina Hawley Sadoti.

This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

VII. REGULATORY IMPACT STATEMENT

The committee has determined that there will be no increase in the regulatory burden imposed by this bill.

VIII. Application of Law to Legislative Branch

S. 295 clarifies the legality of employee involvement programs in workplaces covered by the National Labor Relations Act, as amended, and as such has no application to the legislative branch.

IX. Section-By-Section Analysis

Section 1 provides that the short title of the bill is the "Teamwork for Employees and Managers Act of 1997."

Section 2 provides the findings and purposes of the legislation. Specifically, the findings by the Congress recognize the escalating demands of global competition, the resulting need for an enhanced role for employees in workplace decision making, the extensive use by firms of employee involvement techniques, the positive impact of and support for employee involvement, and the legal jeopardy for employers engaging in employee involvement.

The purposes of the act are to protect legitimate employee involvement programs against governmental interference, to preserve existing protections against deceptive and coercive employer practices, and to allow legitimate employee involvement programs in which workers may discuss issues involving terms and conditions of employment to continue to evolve and proliferate.

Section 3 amends section 8(a)(2) of the National Labor Relations Act (NLRA) to provide that is shall not constitute or be evidence of an unfair labor practice for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health. The legislation also provides that such organizations or entities may not have, claim, or seek authority to negotiate or enter into collective bargaining agreements between an employer and any labor organizations. Finally, section 3 makes clear that its proviso does not apply in a case in which an independent union represents the employees.

Section 4 provides that nothing in section 3 of the legislation shall affect employee rights and responsibilities under the NLRA other than those contained in section 8(a)(2) of the NLRA.

X. MINORITY VIEWS

The Majority claims that S. 295 is intended to promote employee involvement while protecting workers' rights. In fact, the bill does nothing to promote legitimate employee involvement programs and would do serious harm to the rights of employees under the National Labor Relations Act. The bill amounts to a reversal of more than 60 years of federal labor law that has favored employee self-organization and discouraged employer domination of employee organizations. Furthermore, legitimate employee involvement programs have flourished under the existing law, and the Majority offers no valid reasons for changing the law.

In 1993 and 1994, the Commission on the Future of Worker-Management Relations (the Dunlop Commission), a bi-partisan group of labor relations experts from business, academia and unions, conducted an intensive study of labor-management cooperation and employee participation. The Commission held 21 public hearings and heard testimony from 411 witnesses, received and reviewed numerous reports and studies, and held further meetings and working parties in smaller groups. The Commission made one recommendation that is of particular relevance to S. 295: "The law should continue to make it illegal to set up or operate company-dominated forms of employee representation." Commission on the Future of Worker-Management Relations, "Report and Recommendations," at xvii (December 1994).

Yet now, after just one hearing in this Congress, and only two in the last Congress, the Committee has voted along party lines to report this bill, whose sole purpose is to make company-dominated forms of employee representation lawful. The Committee's action is ill-considered and unwise. It destroys rights fundamental to a democratic society, undermines the purposes of the National Labor Relations Act, and legalizes an anti-union device, the company union, that has a shameful and deeply disturbing history in our country. It is especially troubling that this bill is being offered at a time when employers are increasingly turning to the use of the company union, in the guise of "employee involvement," specifically to defeat union organizing campaigns.

SECTION 8(A)(2) IS FUNDAMENTAL TO THE PURPOSES OF THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act prohibits company-dominated labor organizations because they are inherently destructive of workplace democracy and true employee empowerment. Thus, section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. section 158(a)(2), is one of the core provisions of American labor law. By making employer domination of labor organizations illegal, section 8(a)(2) ensures that all labor organizations will legitimately represent the employees they purport to represent, rather than the

owners and managers with whom they deal over issues relating to the terms and conditions of employment, including wages and hours of work

The law has recognized for more than 60 years that it is profoundly anti-democratic to allow an employer to select the representative of his employees. It is also profoundly arrogant for this Committee or any employer to think that the employer should make that choice for the employees.

If a labor organization, employee representation plan or committee is to be the genuine voice of the employees, its members must be selected by those employees and allowed to operate without outside interference. This principle of independence is so important that it is separately protected by the Landrum-Griffin Act, which makes employer financial assistance to a labor organization a violation of criminal law. See 29 U.S.C. section 186.

Senator Robert Wagner, the author of the National Labor Relations Act (the Wagner Act), considered the prohibition of company-dominated labor organizations to be essential to the goals of the act, which include "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association." When Senator Wagner introduced the bill that ultimately bore his name he declared:

> Genuine collective bargaining is the only way to attain equality of bargaining power. * * * The greatest obstacles to collective bargaining are company-dominated unions, which have multiplied with amazing rapidity. * * * [only] representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. * * * For these reasons, the first step toward genuine collective bargaining is the abolition of the company-dominated union as an agency for dealing with grievances, labor disputes, wages, rules or hours of employment. 1 NLRB, Legislative History of the National Labor Relations Act, 1935 at 16.

The majority acknowledges that Senator Wagner and the Congress condemned "company unions" in and prohibited the domination of "labor organizations" in 1935. The majority erroneously claims, however, that that condemnation did not apply to employee representation plans that do not negotiate labor agreements or committees like those at the Donnelly Corporation or EFCO. But in fact, they did have such plans in mind, since the overwhelming majority of company unions in 1935 never entered into any collective bargaining agreement. No technological advances, and no movement toward a global marketplace, can alter this fundamental fact. The evil that Senator Wagner addressed in 1935 is the same one S. 295 would legalize today.

In *NLRB* v. *Cabot Carbon,* 360 U.S. 203 (1959), the Supreme Court examined the legislative history of the Act's definition of "labor organization" and concluded definitively that Congress had not meant to limit it to organizations that engaged in collective bargaining. First, Congress explicitly considered and rejected in 1935 a proposal by the Secretary of Labor to limit the Wagner Act's

definition of "labor organization" to organizations that bargain collectively.

Second, during consideration of the Taft-Hartley Act in 1947, Congress rejected a proposal very much like S. 295, which would have permitted an employer to form or maintain "a committee of employees and discuss with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or if the employer has not recognized, a representative as their representative under section 9." Congress has consistently rejected the notion that company-dominated labor organizations are acceptable as long as they do not attempt to negotiate a contract. See H.R. 3020, 80th Cong., 1st Sess., 26, reprinted in 1 LMRA Leg. Hist. at 537.

The prohibition of employer-dominated labor organizations makes sense as a practical matter as well as a theoretical issue. No good purpose is served by allowing the employer to choose and dominate the employees' representative. Cooperation is not truly furthered, because the employer is not really dealing with the employees if he is dealing with his own hand-picked "representative." An employer does not need the pretense of a team or committee if he only wants to cooperate with himself.

EMPLOYEE INVOLVEMENT PROGRAMS ARE FLOURISHING UNDER THE EXISTING LAW

As the majority admits, 75 percent of all employers surveyed by the Princeton Survey Research Associates in 1994, and 96 percent of large employers, already had employee involvement plans. By the Majority's own estimate, 30,000 employee involvement plans are already in operation. Section 8(a)(2) has not been an obstacle to this proliferation, and S. 295 is obviously unnecessary to remove any supposed chilling effect of current law.

For the past twenty-five years, the NLRB has abolished employee committees at a rate of only about four per year. This is a striking contrast to the thousands of unlawful discharge cases decided by the Board each year. In 1995 alone, the Board ordered reinstatement of employees discharged illegally for exercising their right to self-organization in 7,478 cases. In 8,987 cases, the Board ordered that employees fired illegally receive back pay.

Furthermore, the few cases in which the Board orders disestablishment of employee committees do not show that the law impedes legitimate employee involvement plans. A study of section 8(a)(2) cases showed that, from 1972 to 1993, the Board disestablished employee committees only 58 times. Of these, 44 were cases in which the committee was formed or used in response to a union organizing drive. Of the remaining 14, all but two were cases in which the employer used the committee to bypass an existing union; in the two remaining cases, the disestablished committees had nothing to do with productivity, quality, or efficiency, and did not empower employees with any decision-making authority. Most of the employers whose committees were abolished were also found guilty of illegal of violating the rights of their employees in other ways, such as illegal surveillance and interrogation, illegal threats, and discharging employees for union activity. Rundle concluded that "There is absolutely no evidence that the NLRB has ever in the

past twenty-two years disestablished a committee of the type employers say they must have to be competitive." James Rundle, "The Debate over the Ban on Employer-Dominated Labor Organizations: What Is the Evidence?" Friedman, Hurd, Oswald, and Seeber, in *Restoring the Promise of American Labor Law,* pp 161–76, ILR Press (1994).

In the three and a half years since the study, the Board has decided only twelve more disestablishment cases. In two of these cases, *Stoody,* 320 NLRB 18 (1995), and *Vons Grocery*, 320 NLRB 53 (1995), the NLRB found no violation. There, employee committees were established by the employer and discussed terms and conditions of employment, but "did not have a 'pattern or practice' of making proposals to management" on such subjects. In six cases a violation was found when the employer established the committees during a union organizing campaign. One case, *Peninsula General Hospital*, 312 NLRB 582 (1993), was reversed by a Court of Appeals, 36 F. 3d 1262 (4th Cir. 1994). In another, *Vic Koenig Chevrolet*, 321 NLRB No. 168 (1996), the employer unlawfully withdrew recognition from the union, instructed workers not to attend union meetings and engaged in other related unfair labor practices.

In three cases the Board disestablished committees where there was no union and no organizing drive at the time the committees were established. In two, *Keeler Brass*, 317 NLRB 1110 (1995), and *Dillon Stores*, 319 NLRB 1245 (1995), the committees had nothing to do with productivity, quality or efficiency and did not empower employees with any decision-making authority. In the third, *Simmons Industries*, 321 NLRB No. 32 (1996), the employer had created four separate committees, of which two, the Jay Plant Corrective Action Team and the Southwest City TQM Committee, were legal because their activities focused on product quality and operational efficiency, and dealt only in isolated instances with working conditions. Two other committees were illegal because they regularly dealt with terms and conditions of employment. Thus the employer was able to retain the committees it needed for quality and efficiency purposes even though working conditions were occasionally discussed, while the committees that clearly violated employee rights and served no legitimate purpose were abolished.

Combined with the previously cited study, these cases comprise a twenty-five year pattern that offers not a single example to show why the law should be changed.

THE "CHILLING EFFECT" IS A MYTH

Proponents have resorted to claiming that these few cases exert a "chilling effect" on employers who want to establish employee involvement plans, but supposedly do not because of concerns about section 8(a)(2). However, employee involvement programs are thriving under current law. As the majority has admitted for over three years, more than 30,000 exist today, and 75% of employers use them—including over 96% of large employers. This alone demonstrates that there is no chilling effect.

Moreover, employer representatives agree. Former NLRB Chairman Edward Miller, appointed to the Board by President Nixon, told the Dunlop Commission that the alleged chilling effect of cur-

rent case law on employee involvement programs is nothing but a "myth." Chairman Miller, now a prominent management attorney, testified as follows on behalf of the National Association of Manufacturers before the Dunlop Commission in 1993: "While I represent management, I do not kid myself. If section 8(a)(2) were repealed, I have no doubt that in not too many months or years sham unions would again recur."

In the overwhelming majority of the decided cases, employers used the committees to thwart union activity, and in all the cases the committees purported to represent employees on terms and conditions of employment without having been authorized to do so by employees they represented. Prohibiting such obviously unlawful activity is a proper result. There is no reason why an employer who seeks to establish legitimate employee involvement programs should be deterred by these decisions.

CURRENT LAW REPRESENTS A CLEAR AND BALANCED APPROACH

The existing case law under section 8(a)(2) represents a balance between employee protections and the legitimate business needs of the employer. The TEAM Act would destroy that balance and substitute a nearly limitless power for employers to form and control employee organizations. The Majority would have us believe that lack of clarity in the law has thrown employers into doubt about the legality of employee involvement, justifying the drastic revision they seek. There is no serious problem with clarity now. Furthermore, a review of decisions appealed to the Courts found only four cases in the past 25 years in which a Court of Appeals refused to enforce an NLRB order discharging an employee committee. The courts have not once disestablished a committee when the Board would have left one intact during at least the past 25 years.

Considering the standards that have been developed through case law, it should be no surprise that legitimate employee involvement programs have not been abolished under current law. In order for the NLRB to find a violation of section 8(a)(2), all four of the following elements must be present:

(1) employer domination of the employee committee;

(2) a pattern or practice of bargaining or dealing between the employer and a select group of employees on the committee;

(3) the employees on the committee must be acting as the representatives of their co-workers, speaking for all employees, not just for themselves; and

(4) the subject matter discussed must be wages, hours, and/or conditions of work, or the committee is not a "labor organization," and is not regulated.

If any one of these elements is missing, there can be no violation. For example, if employees formed a committee and elected the employee members, there would be no violation because the committee was not dominated by management. For example, in *Amoco Oil Co.,* 14–CA–21651 (1992), the company dealt with an association of African-American employees concerning working conditions, provided the association with a place to meet and access to the employer's phone, FAX and copy machine. The NLRB General Counsel nevertheless refused to issue a complaint under section 8(a)(2) be-

cause the employer did not "guide or advise the group" or otherwise establish or dominate it.

If a committee was dominated by the employer but only discussed how to enhance productivity and quality, there would still be no violation because the committee would not be a labor organization. *Vons Grocery Co.,* 320 NLRB No. 5 (1995). If the employer met with all employees, or even with a succession of groups that together constituted all employees, then no representation would be involved. As the NLRB explained in *General Foods Corp.,* 231 NLRB 1232 (1977), discussions even of terms and conditions of employment by a "committee of the whole" does not make such a group a labor organization; accordingly, in such a case there can be no violation of section 8(a)(2).

In *General Foods,* the NLRB made clear that employers have the right under section 8(a)(2) to set up production processes in which significant managerial responsibilities are delegated to employee work teams. In that case, employee teams, acting by consensus of their members, made job assignments to individual team members, assigned job rotations, and scheduled overtime among team members. On the basis of *General Foods* the NLRB General Counsel refused to issue section 8(a)(2) complaints against work teams in *Harcross Pigments, Inc.,* 14–CA–22059 (1993) because they "constitute, in their aggregate, the Employer's entire work force."

The NLRB has also held that committees used to resolve grievances were not illegal, where the committees had decision-making authority and were acting for management and not as employee representatives. *Mercy Memorial Hospital,* 231 NLRB 1108 (1977); *John Ascuaga's Nugget,* 230 NLRB 275 (1977).

Individual dealings with employees about terms and conditions of employment have never been prohibited by section 8(a)(2). Section 8(c) specifically guarantees employers and employees the right of free speech, and section 9(a) protects the right of employees to present their grievances individually or in groups and the rights of the employer to respond and resolve those grievances. The NLRB has also upheld the right of employers to establish groups of employees for brainstorming and for sharing information, even on terms and conditions of employment. As long as the group does not make proposals and the "purpose of such a group is simply to develop a whole host of ideas" or if "the employer simply gathers information and does what it wishes with such information" there is no violation of section 8(a)(2). *E.I. Dupont,* 311 NLRB 893 (1993).

Finally, the NLRB and the courts have taken a common sense approach to section 8(a)(2) that ensures that companies will not violate the law if their employee involvement programs include isolated, occasional, or unintended instances of dealing with the subjects of collective bargaining. *Vons Grocery Co.,* 320 NLRB No. 5 (1995), *Stoody Co.,* 320 NLRB No. 1; (1995), *NLRB* v. *Peninsula General Hospital,* 36 F.3d 1262 (4th Cir. 1994).

To the extent there is any lack of clarity in the existing law it is because there have been so few cases for the NLRB to decide. This has provided much fodder for speculation about how the law might be applied in future cases. For example, in his testimony Professor Estreicher raised questions about whether General Foods, in which work teams were held not to be labor organizations

and therefore legal, might be narrowly construed. But the decision is twenty years old, and it has been used as precedent repeatedly. It is preposterous to rewrite American labor law on the basis of a theoretical possibility that future decisions might create exceptions to the Board's 1977 *General Foods* decision requires that we rewrite American labor law.

The amendment that Senator Dorgan offered on the Senate floor in the 104th Congress sought to clarify the safe havens for employee involvement that have already been delineated through case law. That amendment was a direct response to the complaints of some employers that the case law failed to provide adequate guidance to permit lawful involvement programs.

Under the Dorgan amendment, section 8(a)(2) would have been amended to spell out the right of employers to meet with employees individually or in groups "to share information, to brainstorm, or receive suggestions or opinions from individual employees, with respect to matters of mutual interest, including matters relating to working conditions." It would have guaranteed the right of employers to form employee teams that meet with management and, on occasion, discuss terms and conditions of employment, and also the right to form any group for the purpose of "improving the quality of, or method of producing and distributing, the employer's product or service" and to discuss on occasion, working conditions. It differed from S. 295 in that it did not undermine section 8(a)(2)'s ban on employer domination of labor organizations, and it also protected employees who participated in such groups from losing their rights to collective activity through being reclassified as supervisors or managers as a result of their participation.

The majority misleadingly cites the Dunlop Commission in support of their arguments for S. 295. The Dorgan amendment included more revisions to section 8(a)(2), to accommodate employer concerns, than the Dunlop Commission recommended. Yet it was rejected by the 104th Congress on party lines. This shows that TEAM Act is not about clarifying the law, it is about legalizing employer domination of employee organizations.

S. 295 WOULD OBSCURE THE BOUNDARIES OF PERMISSIBLE CONDUCT

Ironically, the TEAM bill would not only upset the balance of the existing law, it would actually blur the boundaries of permissible employer behavior. The language of the bill is in some places contradictory and in other places misleading, and appears intended to obscure its actual purpose.

On the key issue of whether the employee committees may "address" wages, hours, and terms and conditions of employment, the authors of the TEAM bill used the words, "matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health." This language is devious because it does not appear to specify that terms and conditions would be permissible subjects for employer-dominated employee organizations. But, as Senator Dodd pointed out at the Committee markup of the bill, language such as "including but not limited to" is familiar to all experienced legislators. It signals the drafter's intent to cover many things not specified in the bill. The authors of S. 295, however, made sure that the meaning they intended that catchall

phrase to cover would not be in doubt. The Purposes section which specifies that the bill is intended to legalize "employee involvement programs, in which workers may discuss issues involving terms and conditions of employments."

And certainly the bill's proponents understand exactly what the Act would accomplish. At the Committee hearing on S. 295, former NLRB Member Charles Cohen, testifying in support of the bill, had the following exchange with Senator Reed:

> Senator REED. Let me ask a question of Mr. Cohen, who is an expert in the field. You have read the TEAM Act as proposed. As I read it, it seems to me that *an employer could select unilaterally members of the team* as long as they are roughly equivalent to the number of management members, and that they could talk about quality, productivity and efficiency, but they are not limited to talking about that—in fact, there are no limits to what they could talk about, so effectively, *they could talk about wages, hours, conditions—and as long as this group does not purport to be an exclusive bargaining agent, they would be totally legal. Is that your interpretation?*
>
> Mr. COHEN. Let me try it this way, Senator——
>
> Senator REED. Could you answer my question?
>
> Mr. COHEN. *I believe the answer to that is probably yes.* . . .

In place of the term "dealing with," which has a well established meaning, the authors of the TEAM bill use the term "address," which has no precedent anywhere in the Act. It is only when we reach the words "does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements . . ." that the intent becomes apparent. Employers would be able to engage in actual bargaining with an employee organization that they established and controlled as long as they did not "enter into collective bargaining agreements."

The term "collective bargaining agreement," however, is not defined by the Act, so the meaning of "enter into collective bargaining agreements" is not clear. In its common usage a collective bargaining agreement is written, so that Board and the courts would likely treat it that way. If so, S. 295 means that employee committees, dominated by the employer, could engage in unlimited bargaining as long as no written contract was signed. Furthermore, the employer would be under no obligation to bargain in good faith with the organization, because section 8(a)(5)'s requirement of good faith negotiation applies only to an exclusive representative. Thus employees would not be able to enforce their agreement. Is this not an employer's dream come true?

The claim that the bill protects workers' freedom of choice by forbidding employer-dominated employee committees proclaiming exclusive representation is particularly disingenuous. All an employer would need to do to evade this proscription is simply avoid the words "exclusive representative." A more unbalanced provision is hard to imagine.

The bill would also inject significant confusion into the realm of employee involvement schemes. If the TEAM bill is enacted, the proscription against employer domination of a labor organization will still exist, but it will be either partially or wholly contradicted by the new proviso, which says it is not an unfair labor practice for an employer to "establish, assist, maintain, or participate in" an employee organization. These actions arguably encompass the very criteria used to determine whether an employer is guilty of domination.

Most employer actions now considered evidence of domination would be legalized by the TEAM Act. However, some specific issues that are well-settled under current law, may become ambiguous under S. 295. How would the Board and the courts decide, for example, if setting the agenda of meetings is evidence of domination, as existing precedents hold, or if it is encompassed by "participate" or "assist" or "maintain," and therefore permissible? Similarly, if an employer chose the members of an employee committee, or decided that employee members would be elected by a show of hands, instead of allowing employees to choose the method of selection, would that be domination, or would that be allowed because the employer made the decisions in order to "establish" the organization?

Certainly any of the above actions would be profoundly undemocratic, and the existing law is quite clear about them—they are illegal. But S. 295 would provide no clear barrier to such actions. The Board and the courts would have to decide the extent to which the current standards for domination were eclipsed by S. 295. Considering the very small number of cases decided each year, the law in this area would likely remain unclear for many years. Employer domination would almost certainly be legalized to some extent, but whether the concept of domination would have any force at all under S. 295 is an open question.

The authors of the TEAM bill seem to want employers to be able to establish and dominate employee organizations and bargain with them over wages, hours, and terms and conditions of employment, i.e., repeal section 8(a)(2), but they are embarrassed to say so. Therefore they seek to achieve the effect by indirect and contradictory language. As a consequence, if the bill becomes law, it will radically alter the boundaries of permissible behavior, but it will obscure, not clarify, where those boundaries lie.

TESTIMONY OF REPUBLICAN WITNESSES SHOWED NO NEED TO CHANGE THE LAW

The majority, in their sole hearing on S. 295 in this Congress, failed to bring forward a single employer who had received even so much as a complaint, let alone an actual decision, from the NLRB concerning a section 8(a)(2) issue. As we will show in discussions of recent cases, if the Majority had attempted to do so, the result would have been an embarrassment, since none of the actual cases provides any justification for changing the law. The employers and employees who testified actually provided several illustrations of how employee involvement can succeed without violating the law, and failed to show any need to change the law.

Three employees from IBM's Essex Junction, Vermont facility testified that in their three years of experience as team members they had *never* dealt with issues of wages or hours. Though they were described as the most successful production team in the plant, their activities had never conflicted with the law. Obviously S. 295 is not needed in order for such activities to proliferate.

William D. Budinger, Chairman and C.E.O. of Rodel, Inc., testified about the importance of teamwork to his company, but claimed to fear that he was violating section 8(a)(2). However, his company's teams were perfectly legal, for they do not purport to represent other employees.

J. Thomas Bouchard, Senior Vice President of IBM, and a member of the LPA Board of Directors, offered four examples of how employee involvement and teams can run afoul of the law. Yet, from the evidence he gave, none of them appear to be in conflict with the law. The "diversity networks" apparently form on their own, and IBM merely provides them the opportunity to network with each other. Since there was no evidence the groups were dominated, there is no reason to believe they violate section 8(a)(2).

Similarly, as Bouchard described it, the efforts of employees to accommodate the needs of a co-worker who was a single parent were organized by the employees themselves. Not only does the law permit such activity, it encourages and protects it as "concerted activity," which is one of the key employee rights of NLRA section 7, and which is protected against employer interference or retaliation in Sections 8(a)(1) and 8(a)(3). The same is true of the group of fathers who came forward to talk about leave issues for fathers after the birth of their children. Their action was not just legal, but enjoys protection under the law.

Finally, Bouchard erroneously claimed that section 8(a)(2) prevents companies from complying with state laws that require employers to set up safety and health committees. The NLRB General Counsel has held that employers can comply with state laws like those in Washington and Oregon that require joint safety and health committees without violating section 8(a)(2) because those laws do not require employer domination of the committees or unlawful interference with employee rights. In August 1996, the NLRB General Counsel issued an advice memorandum in *Vanalco, Inc.,* finding that a Washington State safety committee did not violate section 8(a)(2). The General Counsel determined that the financial and administrative support the company provided to the committee constituted "friendly cooperation" and "did not constitute unlawful interference." *Vanalco,* at, 8–9.

Robert Sebris, Jr., an attorney who represents management, made the same error. He claimed that section 8(a)(2) makes it illegal for employers to comply with state laws that require employers to establish joint safety and health committees. He cited an advice memorandum by the NLRB General Counsel that found, based on the particular facts of the case, that Tennessee's state law requires employers to set up committees in such a way that they are inevitably dominated and illegal. That is because the employer determines the structure and procedures of the committees, appoints the employee representatives, and sets the committee's agenda.

But Sebris failed to cite the more recent *Vanalco* case from his own state of Washington, noted above, in which the NLRB General Counsel found that a joint safety and health committee established pursuant to that state's law did not violate section 8(a)(2). Moreover, in a November 13, 1996 letter to Rep. Elizabeth Furse, the NLRB General Counsel stated his opinion that Oregon's law, which is similar to Washington's, is also valid on its face. This is as it should be, and S. 295 cannot be justified on the grounds that existing laws stands in the way of non-union joint health and safety committees.

The majority report notes that Charles I. Cohen, a former member of the National Labor Relations Board (1994 to 1996) favors the TEAM Act. Mr. Cohen testified before this committee on February 12, 1997, that ". . . current law does not provide for a wide variety of workplace efforts. It is my conclusion that, having tried to square meaningful employee participation committees with the current law, it simply cannot be done."

It is difficult to square Mr. Cohen's testimony with the fact that he participated in and joined in the opinions in two of the controlling decisions interpreting section 8(a)(2) of the National Labor Relations Act, decisions that strongly affirmed the legality of employee participation committees. In *Stoody Co.* and *Vons Grocery,* the Board clarified that isolated instances of a committee straying into wage and hour issues would *not* make the committee unlawful. For a team or a committee to violate section 8(a)(2), it must have a *pattern or practice* of dealing with wages, working conditions or work hours. These decisions clarified and broadened the scope of activities allowable to employee involvement committees.

The United States Court of Appeals for the Fourth Circuit has held that a committee that dealt with wages or hours as an isolated incident does not violate section 8(a)(2), and does not need to be disbanded. In *NLRB* v. *Peninsula General Hospital Medical Center* 36 F. 3d 1262 (4th cir. 1994) the court held that a nurses committee established by an employer was lawful, even though it considered working conditions on *several* isolated occasions and made proposals to management.

Thanks in part to Mr. Cohen's efforts as a member of the National Labor Relations Board, employers do not have to be concerned about the legality of employee participation committees that engage in a variety of activities and address a variety of topics. It is telling that in his testimony supporting the TEAM Act, Mr. Cohen was unable to cite a single case in which he believed that employers and employees would have been better served, had his decision not been constrained by the current text of section 8(a)(2).

Professor Michael LeRoy testified on his survey of 23 employee involvement programs provided by Fortune 500 companies in eight states. He found that about 30% dealt with "issues generally prohibited by *Electromation*." The Majority cites his estimate that 30% of employee involvement programs may be illegal, arguing that this figure shows that "[r]emoval of legal restrictions that hamper worker participation is particularly critical." But in his research paper about the survey, LeRoy admitted that the sample's small size "means that the results and conclusions may not be generalized." He went on to point out several biases in the sample that could dis-

tort the results. But even more fatal to the use of his study as evidence about S. 295 is his statement about the nature of his questions, "The survey was not detailed enough to determine whether an actual violation was present." Michael H. LeRoy, *Can TEAM work? Implications of an Electromation and Dupont Compliance Analysis for the TEAM Act,* 71 Notre Dame Law Review 242, 245 (1996).

But that is still not all. Even if 30% of all employee involvement programs violated section 8(a)(2), it does not follow that section 8(a)(2) is a problem. It would mean that 70% of employee involvement programs do *not* violate section 8(a)(2). This raises an obvious question: if so many employers have employee involvement plans that do not violate the law, is there any reason why the other 30% should not comply with the law, too?

Finally, LeRoy's support for the TEAM Act is based on a misreading of the law. He believes that the TEAM Act would not allow a dominated committee to deal with the employer on matters relating to wages, hours, and working conditions. As we show, a close reading of the law as well as the express admissions of its supporters, including former NLRB member Cohen, show that the TEAM Act would allow an employer to dominate an employee committee and bargain with it over those issues.

The majority also cites former Secretary of Labor Robert B. Reich, and the Dunlop Commission Report to bolster their arguments for S. 295. But Secretary Robert Reich and every member of the Dunlop Commission publicly stated their opposition to S. 295. Nothing in the testimony before this committee or elsewhere belies these facts.

UNTIL RECENTLY, KEY PROPONENTS OPPOSED ANY CHANGE IN THE LAW

If the bill is passed it will be vetoed, as the identical bill was vetoed last year. The question then becomes, what is really motivating proponents of S. 295? The answer is: politics. If we examine the groups pushing this bill, their composition, their positions on other employment laws, and their flip-flopping positions on this bill, we can see just how cynical this legislation really is.

The "TEAM Coalition," a group of 110 corporate and trade association members, is the driving force behind S. 295. Yet two of the key employer organizations in the TEAM Coalition, the Labor Policy Association (LPA) and the National Association of Manufacturers (NAM), both declared just three years ago that they opposed any change in section 8(a)(2). On September 8, 1994, the Dunlop Commission held a public hearing at which representatives of the two groups testified on whether the *Electromation* decision, disestablishing employee committees that were dominated by the company, created a chilling effect on employee involvement that justified changing section 8(a)(2).

John C. Reed, Chairman of the Employee Relations Committee of the NAM, stated, "The NAM believes that the current Board and Board Chairman should be provided time and the opportunity to narrow in focus and constrain that [chilling] effect through whatever means the Board has at its disposal. . . . So we want to take a 'wait and see' approach." Similarly, Edward V. Knicely, Vice-

President of TRW, Inc., testified for the LPA, "we believe that we should give the Board an opportunity. . . . We're willing to see how the Board rules in some of these future cases. But clearly, if that does not change then we are prepared to pursue other legislative avenues through Congress that would help us make the changes we believe . . . are necessary to continue this whole employee involvement cultural change."

Given this stance, the only reason for the LPA and the NAM to switch their position is if new Board decisions constrained employers in the use of legitimate employee involvement programs. Yet a letter from the Vice-President and General Counsel of LPA to Senator Jeffords (March 27, 1997), despite extensive discussion of the LPA's switch, fails to mention a single case in which the Board did that. LPA's General Counsel certainly did not have much to work with. Between Knicely's September 8, 1994 testimony that the LPA was waiting to see if legislation was necessary, and the time the TEAM Act was introduced in the 104th Congress, the Board decided only one case, *Magan Medical Clinic, Inc.,* 314 NLRB 1083 (September 12, 1994). In *Magan Medical,* the Board found that the employer had unlawfully interfered with the formation of an employee committee, but had not dominated it. Because the committee was not dominated, the Board said that all that was necessary for the committee to function legally was a majority vote of the employees indicating that they wanted it to represent them. This should not be a barrier to employee involvement. Employers should not impose a particular employee representational system on employees who do not want it. In any event, there was absolutely nothing new about the decision, and TEAM Act proponents have not cited it as a problem.

No matter how much the LPA may protest, there is only one thing that changed between the time they announced their wait-and-see approach and the time the TEAM Act was introduced, and it wasn't the law. What changed was politics, and that is what the bill is about. When Republicans gained control of Congress in November 1994, the TEAM Coalition saw its chance to attack the rights of workers, and switched from advocating a wait-and-see approach to pushing for virtual repeal of a key principle of American labor law, the ban on employer domination of labor organizations.

Since the hearings in which the NAM and the LPA declared their opposition to changing section 8(a)(2), the NLRB has decided only twelve cases, about four per year. These cases put no new restrictions on employee committees and, in fact, two of the cases actually expanded and clarified the contours of permissible activity. Since the case law continues to be consistent with the wait-and-see approach that the NAM and LPA favored, why do they now demand a drastic change to section 8(a)(2)?

This anti-union, anti-worker legislative assault is entirely consistent with other legislative actions in which proponents of S. 295 have engaged. The LPA and the NAM both opposed the Worker Adjustment and Retraining Notification (WARN) Act, which simply requires employers to notify workers 60 days in advance of a plant closing or a major layoff. They also opposed the Family and Medical Leave Act, which has given millions of workers the opportunity to take care of their families or themselves during serious medical

conditions, without fear of losing their jobs. The NAM also opposed the Civil Rights Act Amendments of 1991. Further the NAM opposed increasing the minimum wage, along with other TEAM Coalition members, including the National Federation of Independent Business and the National Restaurant Association. These organizations claim that they want to "empower" employees, but their legislative records show that they want to be able to close plants without notifying employees or the community in advance, keep wages below the poverty level, permit rampant discrimination in the workplace, and fire employees who stay home to take care of sick children. This legislation has noting to do with employee involvement or employee empowerment, and everything to do with striking a blow against employee rights while the time is ripe.

It is not necessary to speculate about the goals of the TEAM Coalition. A June 5, 1995 memo to member companies from their counsel emphasized "two critical components of the TEAM Act which should not be compromised: (1) Employee involvement structures should be able to deal directly and exclusively with terms and conditions of employment" and (2) that control of the "formation, composition and operation of EI structures is best left in the hands of the employer and the employees who will shape them to meet the needs to be addressed. Deregulation of EI [employee involvement] is as critical as legalization. Any attempt to specify what constitutes a legal employee involvement approach flies in the face of the vast diversity of successful EI structures that have been developed by employers and employees without having to follow a federal blueprint."

Of course, the only "federal blueprint" that exists right now is nothing more nor less than the requirement that the employees themselves decide what organization, if any, should represent them with respect to wages, hours, and working conditions. That employee choice should be portrayed as an inflexible barrier to the participation of employees in the decisions that affect their terms and conditions of their employment shows who this bill is really designed to empower: employers, at the expense of employees. The freedom from regulation that LPA demands is a freedom of the employer to impose, and to retract, any system of employee representation that the employer chooses. Any role that employees might have in such a process is strictly up to the good graces of the employer.

This, in their own words, is what TEAM supporters want: employer-controlled committees dealing directly and exclusively with terms and conditions of employment. They have never denied that this is their intention. If this is not a sham union of exactly the type outlawed for more than 60 years, then what is? These employers boldly demand of Congress nothing less than outright repeal of section 8(a)(2), which is what the Majority, through S. 295, would obligingly do.

One NAM representative, Edward Miller, was honest about the impact the TEAM Act would have on American workers. Former Chairman of the NLRB, appointed by President Nixon, Miller testified to the Dunlop Commission in 1993, "While I represent management, I do not kid myself. If section 8(a)(2) were repealed, I have no doubt that in not too many months or years sham company

unions would again recur." Nothing in the TEAM Act rebuts Chairman Miller's characterization.

S. 295 WOULD LEGALIZE EMPLOYER CONDUCT THAT SHOULD REMAIN UNLAWFUL

The only cases the Majority cited in support of its argument that section 8(a)(2) should be amended, *Electromation, EFCO Corporation, Keller Brass, Polaroid* and *Donnelly,* are cases that have nothing to do with quality circles, self-managed work teams, front-line efficiency, the introduction of new technology or work practices, or expanding employee decision-making. If S. 295 is intended to improve American competitiveness and empower employees with decision-making authority, in good faith, without thwarting the right of employees to organize, then the Majority should present us with cases in which the NLRB has disestablished committees that met those criteria. If they cannot do so, then they are wasting time and resources on a problem that does not exist.

As the NLRB wrote in *Electromation,* 309 NLRB at 182,

> This case presents a situation in which an employer alters conditions of employment and, as a result, is confronted with a workforce that is discontented with its new employment environment. The employer responds to that discontent by devising and imposing on the employees an organized committee mechanism composed of managers and employees instructed to "represent" fellow employees. The purpose of the Action Committee was, as the record demonstrates, not to enable management and employees to cooperate to improve "quality" or "efficiency", but to create in employees the impression that their disagreements with management had been resolved bilaterally. 309 NLRB at 182.

Far from being a legitimate cooperative effort on the part of management, the action committees at Electromation were nothing but a technique to manipulate employees. As the Court of Appeals noted:

> The company proposed and essentially imposed the action committees upon its employees as the only acceptable mechanism for resolution of their acknowledged grievances. . . . Electromation unilaterally selected the size, structure, and procedural functioning of the committees; it decided the number of committees and the topics to be addressed by each. . . . Also, as was pointed out during oral argument, despite the fact that the employees were seriously concerned about the lack of a wage increase, no action committee was designated to consider this specific issue. In this way, Electromation actually controlled which issues received attention by the committees and which did not.

In *EFCO,* 17–CA–6911 (1995), the Administrative Law Judge (ALJ) found that the employee committees in question, which dealt with benefit issues relating to employee stock option plans and profit sharing, were different from those in *Electromation* only "in

form, not substance." Slip op. at 28. He found that EFCO's committees were established unilaterally by management, which chose the initial membership, participated in almost all of the meetings of the various committees, and selected some of the issues the committees dealt with.

Furthermore, EFCO engaged in numerous activities that were destructive of the employees' right to form and join a union. The ALJ found that EFCO violated section 8(a)(1) of the NLRA by maintaining an invalid no-solicitation rule, creating the impression of surveillance, and soliciting grievances from employees.

EFCO's employee committees did not empower workers. They were created or revived in the context of an organization drive by the United Brotherhood of Carpenters, which began organizing EFCO in 1991 and had assigned two additional organizers to the campaign as employees in 1992.

EFCO's committees were delegated no real power, and EFCO reserved for itself the authority to decide which recommendations, suggestions, policies, safety rules, and employee benefits would be adopted. In particular, the safety committee had "lapsed into inactivity" for some three years until its reactivation during the organizing drive. The ALJ found that the safety committee was not taken seriously by the employees, that there was "widespread disregard, even ridicule, of the safety committee's efforts to improve plant safety."

In *Keeler Brass*, 317 NLRB No. 161 (1995), the employee committee in question was established to handle employee grievances. The Board found that, rather than empowering employees to handle grievances free of company influence, the company dominated the committee by determining the committee's membership eligibility rules, approving candidates, conducting the election, counting the ballots, and soliciting employees to vote for particular committee members.

Since the activities found to violate section 8(a)(2) in *Electromation, EFCO,* and *Keeler Brass* had nothing to do with quality circles, self-managed work teams, increasing efficiency on the front-lines, improving the quality of a product or service, introducing new technology or work practices, or expanding employee decision-making, these cases do not support the majority's contention that section 8(a)(2) needs to be amended.

The result in the *Donnelly* case will not be changed even if S. 295 becomes law. The Donnelly Equity Committee claimed to be the exclusive collective bargaining representative of workers at one of its plants. The bill expressly excludes committees which "claim or seek authority to negotiate or enter into collective bargaining agreements."

Testimony provided to the Committee in the 104th Congress by Alan Reuther, Legislative Director of the United Automobile, Aerospace, and Agricultural Implements Workers Union (UAW), recounted efforts by Donnelly to use its company-created Equity Committees to thwart organizing efforts by the UAW. In particular, Reuther testified that Donnelly had actively resisted the UAW's organizing drive, distributing anti-union literature to workers while trying to bolster the credibility of this Equity Committee by ex-

panding worker representation and referring to the committee's work as a "grievance resolution process."

According to Reuther, 70 percent of the employees signed authorization cards that designated the UAW as their representative and asked for a representation election. Donnelly then derailed the secret ballot union representation vote by prompting the "Equity Committee" to seek resolution of pending unfair labor practices prior to the vote.

The Donnelly Equity Committees, upon scrutiny, turn out to be nothing but an old fashioned company union, used, just like the company unions of the 1930's, to try to prevent employees from organizing. The *Polaroid* case began not as a section 8(a)(2) charge, but as a charge under the Labor Management Reporting and Disclosure Act (LMRDA) by an employee against the conduct of officer elections to the "Employees' Committee," which made recommendations to management concerning company policies, benefits, wages, hours, and working conditions. The Labor Department issued a preliminary finding that the elections did not comply with the LMRDA's requirements that are designed to ensure that labor organizations observe certain democratic practices, in this case, the election of officers by the employees they represent. Polaroid dissolved the Employees' Committee rather than hold the required election, stating that an election would be "disruptive" and "divisive." Subsequently, Polaroid set up another organization. Like the Employees' Committee, the new organization was established to deal with terms and conditions of employment not quality of product or efficiency of the production process.

The case law cited by the majority in support of the TEAM Act does not justify any changes to Section 8(a)(2). Moreover, in the three years that the Republicans have been pushing this legislation, they have failed to cite a single case demonstrating that the law needs to be changed. Nor has the majority produced a single witness to testify that he or she has done anything legitimate that has been ruled unlawful by the NLRB or the courts. The majority has utterly failed to make even the most superficial case for changing the law. Outright repeal of a labor law that has worked well for over sixty years requires far more than this.

THE DUNLOP COMMISSION REPORT SHOWS NEED FOR OTHER CHANGES IN LABOR LAW, BUT DOES NOT SUPPORT THE CHANGES IN S. 295

The blue-ribbon Dunlop Commission, appointed in 1993 by Labor Secretary Reich and Commerce Secretary Brown, included corporate executives (among them, Paul Allaire, the CEO of Xerox), three former Secretaries of Labor (two from Republican administrations), a former Commerce Secretary, a former union president, and distinguished academics. The Dunlop Commission issued its report and recommendation in December 1994.

The Dunlop Commission's recommendations are the best starting point for deciding what changes need to be made in the current law of the workplace. Instead of addressing isolated topics—the way the TEAM Act does—the Dunlop Commission looked at the whole legal system governing workers and managers.

The Commission identified serious problems that go to the heart of the current labor system and that demand attention. Revising

Section 8(a)(2) of the National Labor Relations Act, which is the sole focus of the TEAM Act, is only a small part of a much bigger picture. Tinkering with one part of the system, while ignoring other parts, makes no sense. The parts are interconnected. Some parts are more important than others. Improving the system means understanding how the parts fit together and how the whole system is working—or not working.

The Dunlop Commission addressed the law of worker representation and collective bargaining. One of the questions that the Dunlop Commission was asked to answer was:

> "What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperation behavior, improve productivity, and reduce conflict and delay?"

The Commission began its answer by making a remarkable observation, which cannot be ignored.

> "The evidence reviewed by the Commission demonstrated conclusively *that current labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers' rights to choose whether or not to be represented at the workplace.* Rectifying this situation is important to insure that these rights are realized for the workers who wish to exercise them, to de-escalate workplace conflicts, and to create an overall climate of trust and cooperation at the workplace and in the broader labor and management community." [Dunlop Commission Report, p. xviii.]

In other words: The law is not working and it needs to be fixed.

The Commission made a number of findings that supported its conclusion. It found that:

> (1) "American society—management, labor, and the general public—supports the principle that workers have the right to join a union and to engage in collective bargaining if a majority of workers so desire."
>
> (2) "Representation elections as currently constituted are highly conflictual for workers, unions and firms."
>
> (3) "The probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA [National Labor Relations Act] has increased over time."

With respect to discharges of union activists, the Commission pointed to some terrible statistics:

> Improper firings of union activists occur in one of every four union elections; and seventy-nine percent of American workers surveyed say it is likely that employees who seek union representation will be fired. [Commission Report, p. 19.]

Those figures shape—or distort—what happens in the workplace. The Commission stated, "This fear is no doubt one cause of the persistent unsatisfied demand for union representation on the part of a substantial minority of American workers." [Commission Report,

p. 19.] Fear should not be a factor in the collective bargaining process. Fear is the antithesis of free choice. And free choice is the core principle of American labor law.

As the Dunlop Commission observed, the flaws in the current legal framework for collective bargaining must be addressed—for the benefit of workers, managers, and the country as a whole. In the Commission's words:

> "All participants—employees, management, and unions—would benefit from *reduction in illegal activity and deescalation of a conflictual process* that seems out of place with the demands of many modern workplaces and the need of workers, their unions, and their employers." [Dunlop Commission Report, pp. 15–16.]

The Commission did not simply point to this problem and express the hope that it would go away. Instead, the Commission made specific recommendations for changing the law. The recommendations include:

Authorizing injunctions to remedy discrimination against workers in organizing campaigns and first-contract negotiations. The Commission recommended that Congress change the law, to authorize injunctions under 10(I) of the National Labor Relations Act against employers who discriminate against workers. This provision requires the NLRB to seek injunctions and to give case priority.

Ensuring employee access to union views on representation. The Commission observed that access to union and employers is crucial to workers' free choice about representations. But, said the Commission, "employees have little access to the union at work—the one place where employees naturally congregate," while employers have virtually unlimited access. [Commission Report, p. 23.] To promote free choice, the Commission recommended that Congress overrule the Supreme Court's decision in *Lechmere* v. *N.L.R.B.*, and thus give employees access to union organizers in privately-owned, but publicly-used spaces like shopping malls.

The conclusion of the Dunlop Commission on worker representation and collective bargaining is worth quoting in full:

> *"Employee freedom of choice about whether to have independent union representation for purposes of collective bargaining remains one of the cornerstones of a flexible system of worker-management cooperation in our democratic society,* whatever portion of the workforce decides to avail itself of this form of participation. A labor relations environment marked by prompt, pre-hearing elections, effective injunctive relief for discriminatory reprisals in the representation process, and flexible dispute resolution of first contract negotiations, including arbitration where necessary, will provide American workers greater freedom to choose collective bargaining if that is what they want. Taking these steps is an integral part of an effort to reduce conflictual relations and to reform the regime governing workplace participation. Employee free choice about independent union representation serves both as a guarantor of the integrity of employee involvement plans in nonunion facilities and as a voluntary worker-management al-

ternative to direct federal regulation of the employment relationship." [Commission Report, p. 24.]

The Commission's last point is important. Employee free choice, the Commission points out, helps guarantee the integrity of employee involvement plans. If free choice is missing—if free choice is a myth—then employee involvement plans are suspect. We can't be sure that they truly serve workers. It follows, then, the *before* we focus on employee involvement plans, the way the TEAM Act does, we pay attention to employee free choice. That means addressing the Dunlop Commission's recommendations. The Commission has pointed out the forces that are undermining free choice about workers representation and collective bargaining. And the Commission has shown us how to begin to make free choice a reality again. That should be our first priority.

THE REAL PURPOSE OF S. 295 IS TO THWART UNION ORGANIZING

As Senator Wagner recognized, company-dominated labor organizations are a major obstacle to the development of real unions that represent employers vis a vis their employers and that can help them achieve improvements in their wages and working conditions.

Two recent studies, one by James Rundle of Cornell University, and the other by Kate Bronfenbrenner of Cornell University and Tom Juravich of the University of Massachusetts, both found that employers that use employee involvement plans during union organizing campaigns are much likelier to defeat the union than employers who do not institute such plans. Both studies were scientific samples of all organizing campaigns in the United States involving 50 or more employees that occurred during a one-year period. Bronfenbrenner and Juravich found the same effect in public sector union organizing campaigns as in the private sector. Rundle's study showed that the negative effects of employee involvement plans on union organizing were especially severe where the plan or committee dealt with the employer on pay issues, which is one of the things that S. 295 would legalize.

Rundle's study makes a comparison with an earlier study by Bronfenbrenner (part of the Bronfenbrenner and Juravich study) that reveals a profoundly disturbing fact: the proportion of employers that use company unions as anti-union devices, in the guise of employee involvement committees, has been rising rapidly in recent years. The Bronfenbrenner study found that union organizers in 1986 encountered employee involvement committees in only 7% of all campaigns. By the time of Rundle's sample in 1994, organizers were encountering employee involvement programs in 32% of all campaigns. In both studies, employers who used employee involvement programs also ran more aggressive anti-union campaigns, based on the number and intensity of specific anti-union tactics, including illegal discharge of union supporters. This means that the TEAM Act is being proposed at the same time that the use of employee involvement programs as an anti-union tool during union organizing drives is becoming more popular among employers. James Rundle, "Winning Heart and Minds: Union Organizing in the Era of Employee Involvement," in *Organizing to Win: New Research On Union Strategies,* Bronfenbrenner, Hurd, Oswald,

Seeber, Eds., ILR Press/Cornell University Press (forthcoming, fall 1997). Kate Bronfenbrenner and Tom Juravich, *The Impact of Employer Opposition to Union Certification Win Rates: a Private/Public Sector Comparison,* Economic Policy Institute, Working Paper No. 113 (February, 1995).

Not surprisingly, employers know about the effect of employee representation plans on union organizing, and union avoidance is an explicit purpose of many such plans. As Charles Morris reports in his article, "Deja Vu and 8(a)(2), What's Really being Chilled by *Electromation*," (April 30, 1994), a study of employee representation plans published by the Harvard Business School Press in 1989 found that in every company studied, managers cited the plans as "a valuable and proven defense against unionization."

Electromation is a perfect illustration of how company-dominated employee committees impede union organizing, and how their disestablishment pursuant to section 8(a)(2) promotes employee empowerment by protecting the right of employees to form independent labor organizations. The International Brotherhood of Teamsters petitioned for an election in 1989, while the "action committees" were in operation. The company mounted a vigorous anti-union campaign and suspended the committees until after the election. The union lost the election. A second election was held after a National Labor Relations Board Administrative Law Judge found the action committees to be in violation of section 8(a)(2) and ordered them disbanded. The union won the election. Subsequently, after a decertification petition was filed, a third election was held, and the union won that vote, too.

If the proponents of S. 295 had their way, the employees at Electromation would never have voted for a union. Today, as a direct consequence of acting on their section 8(a)(2) rights, the workers have their own union, chosen and run by them, in which they make decisions through a democratic process. Through their union they have negotiated a 3-year collective bargaining agreement, ratified by majority vote of the employees. This is precisely how the law is supposed to operate. Thus, *Elecromation* proves the opposite conclusion from that which the majority cites it: no change is warranted.

EMPLOYEES WANT FREEDOM OF CHOICE, NOT EMPLOYER CONTROL

The majority cites a study by Richard Freeman and Joel Rogers as evidence that employees want employee involvement, and by implication would favor the TEAM Act. (*Worker Representation and Participation Survey* Richard B. Freeman and Joel Rogers, conducted by Princeton Survey Research Associates, December 1994). This is completely misleading, first, because the majority fails to mention parts of the study that refute this view, and second, because the study was never intended as a referendum on the TEAM Act, and so does not include questions that would directly address what the TEAM Act would do.

The Freeman and Rogers study shows that workers want to choose their own representatives. Only 10 percent believe that management should select the employee representatives while 59 percent thought employee representatives should be elected. Most employees (59 percent) also thought that in cases of conflict, final

decisions should be made by an outside arbitrator rather than leaving the final decision to management. But the June 5, 1995 memo from the TEAM Coalition counsel rejected "[a]ny attempt to specify what constitutes a legal employee involvement approach," so under S. 295 employers would be free to choose the employee representatives and keep all final decisions to themselves.

The survey did *not* ask the critical question, namely whether employers should be allowed to impose a system of employee representation without the consent of the employee. It is not hard to imagine that the response would be similar to the employee's response to the idea of employers choosing employee representatives: overwhelming rejection. In any event, the study cannot legitimately be cited as the majority does.

S. 295 WOULD UNDERMINE THE BASIS OF AMERICAN LABOR LAW

The National Labor Relations Act was designed to minimize the role of government in labor relations, and as such is uniquely American. In all European countries, for example, employees are guaranteed a certain amount of vacation by law, in most cases four or five weeks per year. In this country, employees have no such rights. Instead, they have a right to organize and bargain with the employer. Apart from enforcing those rights, and enforcing strictures against certain kinds of union activity, the government does not get involved. Even when employers have been found guilty of egregious violations of their duty to bargain in good faith, the government stays out of decisions about wages, hours and other terms and conditions of employment (beyond the minimums set by the Fair Labor Standards Act). Instead, the government leaves it up to the two parties to work out such issues between themselves.

The key to this system is that there must be two parties. That is why section 8(a)(2) lies at the heart of the National Labor Relations Act. By requiring that any organization that speaks for employees be independent of the employer, section 8(a)(2) is intended to ensure that such an organization is accountable to the employees, just as those who speak for an employer are accountable to that employer, so that the two parties can represent their respective interests.

The law does not require that the two sides do this in an adversarial or conflictual way. It merely recognizes that however much the interests of employees and employers may overlap, due to their mutual interest in the success of the enterprise, their interests may differ with respect to other issues, such as compensation, hours of work, and due process for discipline. Nothing in the various participative workplace experiments around the country changes this fact. Indeed, at the same time that the majority of firms claim to have employee involvement programs, real wages for workers have on average been falling, while profits have been rising. The alarming increase in disparity of income and loss of secure employment opportunities for the average American worker in recent years has not been prevented by the growth of employee involvement programs.

Section 8(a)(2) was intended to foster labor organizations that were capable of offsetting the lack of bargaining power of individual employees in relation to their employers so that workers would

enjoy the fruits of economic progress and the dignity that comes from contractual agreements, all without the government mandating any of those things. Our system of labor relations is inconceivable without it.

DEMOCRATIC AMENDMENTS

The Majority claims that its primary objective in eliminating the protections of section 8(a)(2) of the National Labor Relations Act is to give more authority and autonomy to employees. However, the TEAM Act bolsters employer prerogatives without a commensurate enhancement of employee rights under the NLRA.

At the TEAM Act Executive Session, Democrats offered a number of amendments that address directly some of the most serious problems with S. 295. Senator Kennedy offered an amendment to protect team members from losing their right to organize under the NLRA. Senator Kennedy also offered an amendment to exempt from S. 295 workplaces where organizing was already in progress. Senator Wellstone offered an amendment to impose tougher penalties on repeat violators of section 8(a)(2) and to deter further violations.

Democrats also offered amendments designed to remedy some of the inequalities that presently inhere in the NLRA. These amendments would have provided employees with enhanced legal remedies for NLRA violations by an employer, provided that the National Labor Relations Board must seek immediate reinstatement for workers fired during organizing, provided that employees can bargain over the issues that affect them, and provided equal access to the job site and equal time for unions to speak with employees during organizing drives. The Committee rejected all of Senator Kennedy's amendments on party-line votes.

Senator Kennedy offered an amendment to preserve the status as employees protected by the NLRA of employees who collectively, as part of a work team or committee, take on some of the decision-making authority of managers. The amendment would have changed the definition of "supervisor" in section 2 of the NLRA to exclude individuals whose only supervisory role is to direct the work of another employee, without having the power to hire, fire, discipline or discharge the employee. This amendment is necessary because the United States Supreme Court has broadly interpreted the definition of supervisor to deny numerous workings their right to an independent voice in the workplace. Majority witness and former NLRB Member Charles Cohen testified at the hearing on S. 295 that "employees [should] not be deemed supervisors or managers solely by virtue of their participation in [committees or teams]." The Dunlop Commission also recommended this correction.

Senator Kennedy offered an amendment to provide that the TEAM Act will not apply in workplaces where a union organizing campaign is underway. It is in those instances where management is combatting a union that the employer is most likely to misuse teams and commit unfair labor practices. The few violations of section 8(a)(2) found by the NLRB overwhelmingly deal with employer efforts to set up teams in order to frustrate union organizing efforts.

Since 1993, the Board ordered companies to disband employee committees in 16 cases. In 11 of them, the violation occurred in response to an organizing campaign. Between 1972 and 1993, the Board ordered employers to disband employee committees 58 times. In 76 percent of these cases, an organizing campaign was in progress at the time of the violation. In all but one of these cases, the employer was also found guilty of unfair labor practices.

Senator Wellstone offered an amendment to prohibit employers from committing repeat violations of the provisions against employer interference in the formation of a labor organization. In cases where the National Labor Relations Board has found an employer to be in violation of section 8(a)(2) of the National Labor Relations Act, the Board could take such action as it considers necessary to remedy the effects of the violation, including requiring the employer to provide unions with reasonable access to the employer's property. The Board would also be required to issue a cease and desist order, directing the company not to violate section 8(a)(2) again for a period of five years.

The amendment would have corrected a flaw in section 8(a)(2). Currently, an employer who is found by the Board to have established a company union in response to a genuine union organizing drive is required to dismantle the illegal entity—that is all. The Board has no remedy to deter repeat offenders. The amendment would have provided meaningful sanctions against repeat offenders, firms that are caught violating their workers' rights but that continue their unlawful activities.

Senator Kennedy offered two amendments to strengthen the remedies provided under the NLRA for unlawful discharges of employees and other unfair labor practices during union organizing campaigns.

The first amendment would have amended section 10(c) to provide for triple back pay and the award of attorney fees as the remedy for illegal discharges during union organizing or during the negotiation of a first collective bargaining agreement.

Currently, workers must risk their livelihood when they start a union. 25 percent of employers respond to union election campaigns by firing union supporters. In 1994, the NLRB granted back pay in over 8,000 cases where workers alleged they were punished for supporting a union. A triple back pay remedy would deter employers from treating illegal firings as an acceptable cost of doing business, and better protect workers when they seek to organize. Almost every other major employment statute contains provisions designed to deter illegal conduct—the National Labor Relations Act should not be an exception.

The second amendment would have amended section 10(l) of the NLRA to require the Board to give top priority to the investigation of charges that an employer has illegally discharged an employee during a union organizing campaign or during the negotiation of a first collective bargaining agreement. If the Board found reasonable cause to believe the charge was valid, it would be required to seek an injunction in federal court pending final adjudication of the charge.

A quarter of employers use discharges to fight union organizing campaigns. In fiscal year 1995, the Board reinstated workers fired

for union activity in 7,478 cases, and ordered back pay in 8,987 cases. Employers have injunctive protection in the case of secondary boycotts—it is only fair to give employees this kind of protection, too. The most democratic way to give employees control over their livelihood is to ensure that employees do not fear for their jobs when they try to start a union.

Senator Kennedy also offered an amendment to expand the range of issues subject to collective bargaining. One way to increase employee empowerment and make bargaining power more balanced is to ensure that critical subjects, such as the decision to close or relocate a plant or to subcontract bargaining unit work, are not excluded from collective bargaining. No issue is more important to employees than the fundamental issue of whether they will have a job at all. The amendment would have amended section 9 of the NLRA to make clear that employees can negotiate over all issues that significantly affect wages, hours, and terms and conditions of employment. This amendment would ensure that as employees have assumed an expanded role in decisionmaking in the workplace, they have the right to bargain with their employers over the key issues that affect them.

Finally, Senator Kennedy offered an amendment to provide employees with as much access to union organizers and information about unions as they have to the employer's anti-union campaign. The amendment would have amended section 8 of the NLRA to make it an unfair labor practice for an employer to deny a non-employee union organizer access to the non-work areas of the employer's facility for the purpose of conferring with employees, if the union had filed a petition for representation with the NLRB. The amendment would also make it unlawful for an employer to deny a union the right to attend a meeting of employees called by the employer to discuss representation by a labor organization.

Employers often respond to an organizing effort with an all-out anti-union campaign, with posters, videos, leaflets, and speeches meant to frighten workers about the consequences of organizing. One common tactic is the "captive audience speech," in which employees are required to attend anti-union speeches during their working hours.

This amendment offered three solutions to bring a greater degree of fairness to union elections: it would protect employees against compulsory attendance or absence from meetings called by an employer on union representation, give unions the right to speak about their goals at these meetings, and give unions real access to employees who are considering whether or not to organize.

CONCLUSION

This bill is identical to the bill that was passed in the 104th Congress on party lines, and vetoed by the President. Once again, the administration has promised a veto. On February 25, 1997, in a letter to Senator Jeffords, the Department of Labor explained that S. 295 would be vetoed again. A copy of that letter is appended to these views. We concur in this view and urge our colleagues once again to oppose this ill-advised piece of legislation.

EDWARD M. KENNEDY.
TOM HARKIN.
JEFF BINGAMAN.
PATTY MURRAY.
CHRISTOPHER J. DODD.
BARBARA A. MIKULSKI.
PAUL D. WELLSTONE.
JACK REED.

APPENDIX TO MINORITY VIEWS ON S. 295

U.S. DEPARTMENT OF LABOR,
SECRETARY OF LABOR,
Washington, DC, Feb. 25,1997.

Hon. JAMES M. JEFFORDS,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

DEAR CHAIRMAN JEFFORDS: We understand that your Committee may consider S. 295, the "Teamwork for Employees and Managers Act," on Wednesday, February 26. I am writing to emphasize the Administration's opposition to S. 295, and to urge your Committee not to order the bill reported.

This bill would amend section 8(a)(2) of the National Labor Relations Act (NLRA) to broadly expand employers' abilities to establish and control employee involvement programs. Section 8(a)(2) states, in part, that it is an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization. By prohibiting employer domination and interference, section 8(a)(2) protects the right of employees to choose their own independent representative to advance their interests.

The Administration strongly supports further labor-management cooperation within the broad parameters allowed under current law. Recent decisions of the National Labor Relations Board (NLRB) have helped clarify the broad legal boundaries of labor-management teamwork, and the NLRB can be expected to provide additional guidance in the exercise of its independent authority. Your Committee's hearing showed that employers currently do have the latitude to cooperate with employee teams. The employee groups described by IBM, for example, were clearly legal, and the IBM team that testified has never found it necessary to discuss wages and hours, showing that productivity and quality teams need not run afoul of the law. I note that the NLRB has ordered only four companies a year, on average, to terminate illegal employee involvement schemes since *Electromation* was decided, and that there is no other penalty for violation of section 8(a)(2).

Rather than promoting genuine teamwork, S. 295 would undermine the delicate system of checks and balances between employer and employee rights and obligations that has served this country so well for six decades. It would do this by allowing employers to establish company unions where no union currently exists and by permitting company-dominated unions where employees are in the process of determining whether to be represented by a union. Rather than encouraging workplace cooperation, this bill would abolish basic protections that help ensure independent democratic representation in the workplace.

As several witnesses before the Committee testified, section 8(a)(2) is not the place to begin reform of the National Labor Relations Act. Rather, they—as did the Dunlop Commission before them—recommend changes in the law to facilitate the free choice of employees to be represented by an independent union and to deter unfair practices by employers, which have become routine and widespread. The Administration agrees with that approach.

For the foregoing reasons, the Administration opposes the enactment of S. 295. If S. 295 were presented to the President, I would recommend that he veto the bill.

Sincerely,

CYNTHIA A. METZLER,
Acting Secretary of Labor.

ADDITIONAL VIEWS OF SENATOR JEFF BINGAMAN ON S. 295, THE TEAMWORK FOR EMPLOYEES AND MANAGEMENT ACT OF 1997

I join my Democratic colleagues on the Labor Committee in opposing S. 295, the Teamwork for employees and Management Act of 1997.

I oppose the TEAM Act as reported because I feel it does not provide enough protections against the company dominated structures which Section 8(a)(2) was enacted to prevent. Anyone who is serious about promoting legitimate employee involvement must also be serious about preventing the proliferation of sham unions. Such structures are not only bad for the American worker, they are bad for American business. I am concerned that S. 295 does not address the practice of establishing teams and committees as a means to interfere with employee's efforts to organize. As pointed out in some of the testimony the Committee heard, this is the situation in which teams most often lose claim to legitimacy.

However, workplaces of the late 1900s are far different from the workplace of the early part of this century. More employers understand the importance of having employees as partners and not simply parts of a machine that churns out products. We should be concerned with providing both employees and employers the tools that empower them and that position America for the new century and the global marketplace in which we will compete.

I also understand the concerns of employers who fear that they are operating outside the law when they institute and promote employee involvement programs. If the Committee report demonstrates nothing else, it demonstrates the uncertainty about what is and is not permitted under 8(a)(2) and it is appropriate for Congress to consider changes that protect against sham unions, protect the legitimate right of employees to organize and allow increased employee participation in the workforce.

XI. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TEAMWORK FOR EMPLOYEES AND MANAGERS ACT OF 1997

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TITLE 29.—UNITED STATES CODE

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UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay**[**;**]** : *Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to at least the same extent practicable as representatives of management participate to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply;*

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